CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 179

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER,

vs.

JOHN F. GUENTHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 19, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,310)

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INDEX

	Original	Print
Record from the district court of the United States, Northern Ohio	1	1
Caption (omitted in printing)	1	
Record from court of common pleas of Cuyahoga County.	2	1
Caption (omitted in printing)	2	
Petition	3	1
Præcipe for summons	7	4
Summons and sheriff's return	8	4
Petition for removal	9	5
Bond for removal (omitted in printing)	11	
Notice of petition and bond for removal	13	6
Order for removal	14	7
Clerk's certificate (omitted in printing)	14	
Judge's certificate to clerk (" " ")	14	
Clerk's certificate to judge (" " ")	15	
Answer	15	8
Reply	18	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1929

	Original	Print
Motion for judgment on the pleadings	19	10
Stipulation that plaintiff may amend reply by interlineation	19	11
Memorandum opinion, Westenhaver, J	20	11
Order denying motion for judgment on the pleadings	22	13
Order granting leave to file amended reply	23	14
Amended reply	23	14
Motion for judgment on the pleadings	24	15
Notice	24	15
Stipulation in re expense of counsel fees	25	15
Order granting plaintiff's motion for judgment upon the pleadings and the stipulation; judgment	25	16
Petition for writ of error	26	16
Assignments of error	27	17
Order allowing writ of error	27	17
Bond on writ of error (omitted in printing)	28	
Writ of error	31	18
Return to writ of error (omitted in printing)	32	
Citation and service (omitted in printing)	33	
Præcipe for transcript of record	35	19
Stipulation re record	36	20
Clerk's certificate (omitted in printing)	37	
Proceedings in United States circuit court of appeals, sixth circuit	39	21
Appearance of counsel (omitted in printing)	39	
Argument and submission (omitted in printing)	39	
Judgment	39	21
Opinion, Hickenlooper, J	40	21
Dissenting opinion, Knappen, J	43	24
Clerk's certificate (omitted in printing)	44	
Order allowing certiorari	45	25

[fols. a-1 & 2] [Caption omitted]

[fol. 3]

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

JOHN F. GUENTHER, 3238 Lorain Avenue, Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Insurance Center Bldg., Defendant

PETITION FOR MONEY ONLY—Filed May 6, 1927

Now comes the plaintiff and for his cause of action herein says that the defendant is a corporation duly organized according to law and authorized to do business in the State of Ohio; that it is entitled in the general insurance business; that on or about the 15th day of February 1925, for and in consideration of the sum of Two Hundred Twenty-one Dollars ($221.00), the said defendant issued to this plaintiff its automobile insurance policy number A L 469,438 (a copy of which policy is in possession of the said defendant) by the terms of which it insured this plaintiff against loss and/or expense arising or resulting from claims upon the assured for damages in consequence of any accident occurring within the limits of United States and Canada during the term of said policy, by reason of the ownership, maintenance or use, (including the carrying of goods thereon and the loading and unloading thereof when commercially used) of the automobile or any of the automobiles enumerated and described in said policy resulting in "Bodily injuries or death resulting at any time therefrom, suffered by any person or persons, excepting (a) the Assured's employe or employes while engaged in operating or caring for any [fol. 4] of the Assured's automobiles, (b) any other employe of the Assured who is injured when engaged at the time of such injury in performing any duty for the Assured in connection with the trade, business or occupation of the Assured." The defendant by the terms of said policy limited its liability to the sum of Ten Thousand Dollars

($10,000.00) for loss arising out of one accident to one individual.

Said policy further provided that the said defendant would defend in the name and on behalf of this plaintiff any suit brought against this plaintiff to enforce any claim, whether groundless or not, on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described and would pay the expenses incurred in defending any suit, also the interest on any judgment within the limits of the insurance granted by said policy and any costs taxed against the assured on account thereof.

This plaintiff further says that on or about the 14th day of May 1925, about 4:30 o'clock P. M., while said above described policy of insurance was in full force and effect, one of the automobile trucks described in said policy owned by this plaintiff and engaged in this plaintiff's business, came into collision with one Fred H. Kroeger, 1520 Lakewood Avenue, Lakewood, Cuyahoga County, Ohio; that in said collision said Fred H. Kroeger received bodily injuries and thereafter and on or about the 4th day of November 1925 the said Fred H. Kroeger instituted in the Court of Common Pleas of Cuyahoga County an action against this plaintiff to recover damages in the sum of Fifty Thousand Dollars ($50,000.00) because of said accident and resultant injury, said action being number 250,486 on the docket of said Court; that this plaintiff fully complied with all of the terms and conditions of said policy of insurance, notified the defendant of the happening of said accident and of the filing of said suit and forwarded to said defendant the copy of the summons and petition served upon him in said action; that thereafter the said defendant, without just cause, notified this plaintiff that it would not settle said claim nor pay any judgment that might be rendered against this plaintiff by reason of said accident and that it would not in any manner defend said suit, all of which was in violation of its said policy of insurance; that thereupon this plaintiff was obliged to and did employ counsel to defend said action and did defend said action at his own [fol. 5] expense; that on or about the 25th day of January, 1927, after a full and complete trial of said cause, a jury in said Court returned a verdict in favor of said Fred H. Kroeger and against this plaintiff in the sum of Two Thousand Dollars ($2,000.00); that thereafter said Fred H.

Kroeger filed a motion for a new trial in said Court; that on or about the 24th day of March 1927 the Court of Common Pleas of Cuyahoga County made the following entry in said action:

"The Court orders that unless the defendant consents to an increase in the amount of the verdict that the verdict would be set aside because the same is against the weight of evidence in that it is insufficient to compensate plaintiff for his injuries and that the same be increased $750.00, making the amount $2,750.00. Thereupon the motion for a new trial is overruled and judgment is rendered against the defendant for $2,750.00 and costs of this suit to which defendant excepts."

That thereafter and on or about the 2nd day of April 1927 this plaintiff paid said judgment in the sum of Twenty-seven Hundred and Fifty Dollars ($2,750.00); that this plaintiff was further obliged and did pay the court costs in said action amounting to Fifteen Dollars and Sixty-two Cents ($15.62).

Plaintiff further says in connection with the defense of said suit he incurred counsel fees in the sum of Eleven Hundred and Twenty-five Dollars ($1,125.00); that by the terms of said policy said defendant had obligated itself to defend said suit at its own expense and pay said judgment and costs and by reason of its violation of its said contract of insurance this plaintiff was damaged in the sum of Three Thousand Eight Hundred Ninety Dollars and Sixty-two Cents ($3,890.62).

Wherefore plaintiff prays judgment against the said defendant in the sum of Three Thousand Eight Hundred Ninety Dollars and Sixty-two Cents ($3,890.62) with interest thereon from the 2nd day of April, 1927, his damages as aforesaid sustained, together with the costs of this action.

Quigley & Byrnes, Attorneys for Plaintiff.

[fol. 6] *Duly sworn to by John F. Guenther. Jurat omitted in printing.*

[fol. 7] In Court of Common Pleas of Cuyahoga County

[Title omitted]

Precipe for Summons—Filed May 6, 1927

To the Clerk:

Issue summons in the above entitled action for service upon the defendant returnable according to law. Endorse same "Action for money only; amount claimed $3,890.62 with interest thereon from the 2nd day of April, 1927 together with costs."

Quigley & Byrnes, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 8] In Court of Common Pleas of Cuyahoga County

Summons and Sheriff's Return—Filed May 11, 1927

The State of Ohio,
Cuyahoga County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify United States Fidelity & Guaranty Company, a corporation, that it has been sued by John F. Guenther in the Court of Common Pleas of Cuyahoga County, and that unless it answer by the 4th day of June, A. D. 1927, the petition of the said plaintiff against it filed in the Clerk's office of said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 16th day of May, A. D. 1927.

Witness, George Wallace, Clerk of said Court and the seal thereof at the City of Cleveland, this 6th day of May, A. D. 1927.

George Wallace, Clerk, by H. L. Nicholas, Deputy Clerk. (Seal.)

THE STATE OF OHIO,
Cuyahoga County, ss:

On the 9th day of May 1927 I served this writ on the within named U. S. Fidelity & Guaranty Company by delivering a true and certified copy thereof with all the endorsements thereon to Terwelliger, Sec'y of said Company, the President or other chief officers of said Company, not found in my County.

E. J. Hanratty, Sheriff, by S. E. Hart, Deputy.

[File endorsement omitted.]

[fol. 9] IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

[Title omitted]

PETITION FOR REMOVAL—Filed June 4, 1927

Now comes United States Fidelity and Guaranty Company and respectfully represents to the Court that it is named as defendant in the above entitled cause, which is of a civil nature, and the matter and amount in dispute in said cause exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that the plaintiff at the time of the commencement of this action was and now is a citizen of the State of Ohio, residing in the City of Cleveland, Ohio, which said city and state are situated within the jurisdiction and limits of the United States District Court, Northern District of Ohio, Eastern Division.

Your petitioner was, at all times mentioned in the plaintiff's petition, and still is a resident of the State of Maryland, and your petitioner desires to remove this cause, before the trial thereof, to the District Court of the United States, for the Northern District of Ohio, Eastern Division.

Your petitioner files herewith a good and sufficient bond under the statutes in such cases made and provided, conditioned as the law directs, and that it will, within thirty (30) days of the filing of the petition for removal, file a certified copy of the record of this cause in the District

Court of the United States, for the Northern District of Ohio, Eastern Division, for the payment of all costs which may be awarded by said court, if said District Court shall determine that this suit was improperly and wrongfully removed thereto.

[fol. 10] Your petitioner further prays that this court will proceed no further herein, except to order the removal, approve the bond herewith presented, and to direct a transcript of the record to be made and certified as provided by law.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Duly sworn to by Peter Reed. Jurat omitted in printing.

[File endorsement omitted.]

[fols. 11 & 12] Bond on renewal for $500.00, approved and filed June 4, 1927, omitted in printing.

[fol. 13] In Court of Common Pleas of Cuyahoga County

[Title omitted]

Notice of Filing Petition and Bond for Removal—Filed June 4, 1927

To Quigley & Byrnes, attorneys for plaintiff, Cleveland, Ohio:

You are Hereby Notified that on the 4th day of June 1927, at the hour of 9:00 o'clock A. M., or as soon thereafter as suits the convenience of the court, the defendant in the above entitled cause, United States Fidelity & Guaranty Company, will file in the Common Pleas Court of Cuyahoga County, in the State of Ohio, in which court said suit is now pending, its petition and bond for removal, of said cause from said court to the District Court of the

United States, in and for the Northern District of Ohio, Eastern Division.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Receipt of the foregoing notice is hereby acknowledged by a copy left this 4th day of June 1927.

Quigley & Byrnes, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 14] In Court of Common Pleas of Cuyahoga County

Order for Removal—June 4, 1927

The above entitled cause came on to be heard before me this 4th day of June 1927, on petition of the United States Fidelity & Guaranty Company for removal of said cause to the United States District Court, for the Northern District of Ohio, Eastern Division, and it appearing from the facts set forth in said petition that the cause is removable to said court, and that the proper bond has been filed.

It is Hereby Ordered, Adjudged and Decreed, that said petition be granted, said bond be accepted and approved, and that a transcript of the record of this court be made and certified as provided by law, and that this court proceed no further herein.

Plaintiff's costs in this action are taxed at $4.66.

Defendant's costs in this action are taxed at $7.40.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 15] Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 21, 1927

Now comes United States Fidelity & Guaranty Company, defendant herein, and files this its answer to the petition heretofore filed herein.

Defendant admits that on or about the 15th day of February 1925 it issued and delivered to plaintiff its automobile liability insurance policy No. AL 469438, which, subject to certain conditions, contained substantially the provisions set forth in plaintiff's petition.

[fol. 16] Defendant further admits that on or about the 14th day of May 1925 while said automobile was being operated by one Theodore Winter, it collided with one Fred H. Kroeger at or near the intersection of Detroit Avenue and Lakewood Avenue in the city of Lakewood, Ohio, and that in said collision the said Fred H. Kroeger received certain injuries on account of which he thereafter recovered a judgment in the Common Pleas Court of Cuyahoga County, Ohio, against the plaintiff herein in the sum of $2,750 and costs.

Further answering defendant denies all of the other allegations in said petition contained.

First Defense

For its first defense defendant says that on or about the 15th day of February 1925 it issued and delivered to the plaintiff herein its automobile liability insurance policy No. AL 469438, wherein and whereby, and subject to the terms, limits and conditions set forth therein, it insured the plaintiff against loss or expense arising or resulting from claims upon him for damages in consequence of accidents occurring by reason of the ownership, maintenance or use of the automobiles described in said policy, resulting in bodily injuries suffered by any person or persons, excepting assured's employees.

Defendant further says that said policy was expressly made subject to certain conditions, one of which was that it should not cover any liability of the assured while any of the insured automobiles was being operated by any person under the age limit fixed by law.

Defendant further says that prior to the 14th day of May 1925, to-wit, on or about the 22nd day of September 1924 the Council of the City of Lakewood, Ohio, duly enacted a certain ordinance which was thereafter duly approved, and which on said 14th day of May 1925 was in full force and effect, said section being as follows:

"It shall be unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of 18 years to operate or run said motor vehicle upon public highways, streets or alleys in said City of Lakewood."

Defendant further says that notwithstanding the provisions of said ordinance and in entire and complete dis- [fol. 17] regard of the same, the plaintiff herein, being the owner of one of the automobiles described in said policy, did on the 14th day of May 1925 permit his employee Theodore Winter, a minor under the age of 18 years, to operate and run said motor vehicle upon the public highways and streets of said City of Lakewood, and that said automobile was being operated by the said Theodore Winter with the plaintiff's consent and permission at the time of the accident to the said Fred H. Kroeger.

Defendant therefore denies that said policy of insurance covered the liability of the assured set forth in the petition herein, and by reason of the premises prays that it may go hence with its costs.

United States Fidelity & Guaranty Company, by Dustin, McKeehan, Merrick, Arter & Stewart, Its Attorneys.

Duly sworn to by Pierce D. Metzger. Jurat omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

REPLY—Filed Sept. 30, 1927

Now comes the plaintiff and for his reply to the answer of defendant says that he admits that on the 14th day of November 1925 there was in full force and effect in the

City of Lakewood, Ohio, an ordinance, a copy of which is correctly set forth in said answer but this plaintiff avers that the policy of insurance issued by said defendant to this plaintiff contained the following:

"This policy is subject to the following conditions:
(A) The policy shall not cover any liability of the assured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event."

that the said ordinance does not prescribe the age limit of an operator of an automobile and that the operator of plaintiff's automobile at the time of the accident to said Fred Kroeger was not violating any ordinance of the City of Lakewood. This plaintiff further says that the operator of this plaintiff's automobile was in fact over the age of sixteen and that the Legislature of the State of Ohio has never enacted any law fixing the age limit of the operators of automobiles and therefore plaintiff's automobile, at the time of the accident referred to in plaintiff's petition occurred, was not being operated by any person under the age limit fixed by law, and except as herein admitted this plaintiff denies each and every allegation in said answer contained.

Wherefore this plaintiff prays for the judgment asked for in his petition.

Quigley & Byrnes, Attorneys for Plaintiff.

Duly sworn to by John F. Guenther. Jurat omitted in printing.

[fol. 19] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed Oct. 6, 1927

Now comes the United States Fidelity & Guaranty Company, defendant herein, and moves that judgment be entered for the defendant upon the pleadings filed in the above entitled case.

United States Fidelity & Guaranty Company, by Dustin, McKeehan, Merrick, Arter & Stewart, Its Attorneys.

Notice of the filing of the foregoing motion and brief in support thereof is hereby acknowledged this 5th day of October 1927.

Quigley & Byrnes, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION THAT PLAINTIFF MAY AMEND REPLY BY INTERLINEATION—Filed Oct. 13, 1927

To the Clerk:

We, the Attorneys for the respective parties, do hereby stipulate that the words "but under eighteen years of age" may be inserted by interlineation by the plaintiff in his reply after the words "was in fact over the age of sixteen."

Quigley & Byrnes, Attorneys for Plaintiff. Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

It is so ordered. D. C. Westenhaver, U. S. District Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed Nov. 17, 1927

WESTENHAVER, District Judge:

This cause is before me on defendant's motion for a judgment in its favor on the pleadings. These pleadings consist of a petition, answer, and reply. The following are the material facts admitted by the pleadings: defendant issued and delivered to plaintiff an automobile liability insurance policy No. AL 469,483, bearing date February 15, 1925. By its terms, this policy indemnified plaintiff against loss or expense arising or resulting from claims upon him for damages in consequence of accidents occurring by reason of the ownership, maintenance, or use of the said automobile, resulting in bodily injuries suffered by any person or persons other than the insured's employees. On May 14, 1925, while said policy was in force, the automobile was involved in a collision, inflicting injuries on one Fred H. Kroeger. Suit was brought by him against plaintiff in the Common

Pleas Court of Cuyahoga County, Ohio. He recovered a judgment for $2,750 and costs. Defendant repudiated liability for said accident and refused to defend said action, as was required by the terms of its policy. This suit is brought on said policy to recover the amount paid by plaintiff in settlement of said judgment and costs and expenses and attorneys' fees in defending in said action.

At the time said accident occurred, the automobile was being operated by one Theodore Winter, with the knowledge and consent of the insured. He was a minor, over the age of 16 and under the age of 18 years. The policy contained a condition in the following language: "The policy shall not cover any liability of the assured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event." The insured lived, and the policy was written and delivered in the city of Cleveland. The accident occurred in the city of Lakewood. In Lakewood an ordinance was then in existence and in force, reading as follows: "It shall be unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of eighteen years to operate or run said motor vehicle upon the public highways, streets or alleys in the said city of Lakewood." The city of Lakewood has no ordinance making it unlawful for any minor over sixteen years of age to operate a motor vehicle. The [fol. 21] State of Ohio has enacted no law making it unlawful for a minor over the age of sixteen years to operate a motor vehicle. The question then is whether the ordinance of Lakewood, where the accident occurred, is a law fixing an age limit, within the meaning of the condition above quoted, of the insurance policy.

In my opinion, a municipal ordinance is not a law within the proper interpretation and construction of said condition of the policy. No principle of law is better settled than that covenants and conditions in an insurance policy, exempting an insurer from liability, are to be strictly construed against the insurer. If the language of a covenant or condition exempting the insurer from liability is susceptible of two constructions or meanings, that will be adopted which is most favorable to the insured. The expression "by law" is at least susceptible of two constructions. It may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a State. Ordinarily,

when one speaks of the "law," this is what is meant. One thus speaking, has in mind a rule of conduct of uniform and general application prescribed by the supreme law-making body of some sovereignty. Ordinarily, when one speaks of a law, one does not have in mind ordinances, by-laws, or regulations of a municipality. The courts take judicial cognizance of statutes or laws of the State. All other persons are conclusively presumed to have knowledge of such laws. The courts do not take judicial cognizance of ordinances, by-laws, or regulations of a municipality. If and whenever one is invoked, it becomes necessary to plead it and prove it. In my opinion, applying the rule of strict construction to the provisions in question, exempting the insurer from liability, it is clear that what the contracting parties must be held to have had in mind was the statute law of a State and not a municipal ordinance, by-law, or regulation, of which courts do not take judicial cognizance.

The insurer, had it been intended to include municipal ordinances, could very easily have said so. In Cuyahoga County there are more than fifty municipalities having equal right to enact ordinances of the same nature as the one in question. It cannot be held that the contract contemplates that every insured should investigate and learn whether an ordinance fixing an age limit was in force in all these municipalities before entrusting his automobile to some one else. The insurer might have written this policy that way. If it had done so, it probably could not have [fol. 22] written any insurance, since it is highly improbable that any automobile owner would knowingly accept a policy subjecting him to a burden so impossible of performance. It is not permitted to an insurer to lay traps and set snares to catch unwary automobile owners.

The motion for judgment on the pleadings will be denied. An exception will be noted.

D. C. Westenhaver, Judge.

November 17, 1927.

IN UNITED STATES DISTRICT COURT

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS—Nov. 17, 1927

This day this cause came on to be heard on the motion of defendant for a judgment in its favor on the pleadings and

was submitted to the Court, on consideration thereof, the Court denies said motion, to which ruling of the Court defendant, by its attorneys, excepts.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE AMENDED REPLY—Dec. 30, 1927

On application of plaintiff, leave is hereby granted him to file his amended reply herein, and said amended reply is accordingly filed.

[fol. 23] IN UNITED STATES DISTRICT COURT

AMENDED REPLY—Filed Dec. 30, 1927

Now comes the plaintiff and for his reply to the answer of defendant says that he admits that on the 14th day of November 1925 there was in full force and effect in the City of Lakewood, Ohio, an ordinance, a copy of which is correctly set forth in said answer but this plaintiff avers that the policy of insurance issued by said defendant to this plaintiff contained the following:

"This policy is subject to the following conditions:
(A) The policy shall not cover any liability of the assured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event."

that the said ordinance does not prescribe the age limit of an operator of an automobile. This plaintiff further says that the operator of this plaintiff's automobile was in fact seventeen years of age, and that the Legislature of the State of Ohio has never enacted any law fixing the age limit of the operators of automobiles, and except the allegations of said answer admitting the allegations of plaintiff's petition and as herein admitted this plaintiff denies each and every allegation in said answer contained.

Wherefore this plaintiff prays for the judgment asked for in his petition.

Quigley & Byrnes, Attorneys for Plaintiff.

Duly sworn to by William M. Byrnes. Jurat omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed Dec. 30, 1927

Now comes the plaintiff and respectfully moves the Court for a judgment on the pleadings and the stipulation heretofore filed in the above entitled action.

Quigley & Byrnes, Attorneys for Plaintiff.

Notice

Counsel for the defendant will take notice that the plaintiff has filed his motion for a judgment in his favor upon the pleadings and the stipulation heretofore filed in the above entitled action, and that said motion will be on for hearing in said Court as soon as the same can be called to the attention of one of the judges thereof, in accordance with the rules of said Court.

Quigley & Byrnes, Attorneys for Plaintiff.

Receipt of a copy of the above motion and notice is hereby acknowledged this 30th day of December 1927.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION IN RE EXPENSE OF COUNSEL FEES—Filed Dec. 30, 1927

It is hereby stipulated and agreed by and between the parties hereto that the expense of the counsel fees described in the petition herein for $750.00 instead of $1,125 as alleged therein, and that in the event that judgment is entered

herein in favor of the plaintiff, the sum of $750, and no more, be allowed by the court as counsel fes for such services.

Quigley & Byrnes, Attorneys for Plaintiff. Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT UPON THE PLEADINGS AND THE STIPULATION FILED; JUDGMENT FOR PLAINTIFF—Dec. 30, 1927

This cause came on to be heard upon the motion of the plaintiff for a judgment in his favor upon the pleadings and the stipulation filed herein, and the Court being fully advised in the premises, finds that said motion should be and the same is hereby granted.

It is, therefore, ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of Three Thousand Six Hundred Fifty-five Dollars and Sixty-two Cents ($3,655.62), for which amount, together with costs in the sum of $—, judgment is hereby rendered against the said defendant, to which judgment and ruling of the Court defendant excepts.

[fol. 26] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed Jan. 9, 1928

Now comes United States Fidelity and Guaranty Company, defendant herein, and says that on the 30th day of December, 1927, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully and in detail appear by the assignment of errors filed with this petition.

Wherefore defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of

errors so complained of, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the said Circuit Court of Appeals.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Duly sworn to by George P. Bickford. Jurat omitted in printing.

[fol. 27] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Jan. 9, 1928

Now comes the defendant in the above entitled cause, and in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred on the trial of this action and in the entering of judgment herein, and upon which it will rely in the prosecution of its writ of error to reverse the judgment of this honorable court:

(1) That the court erred in overruling defendant's motion for judgment on the pleadings.

(2) That the court erred in sustaining plaintiff's motion for judgment on the pleadings and entering judgment for plaintiff pursuant thereto.

Wherefore defendant prays that the said judgment of the District Court of the United States, Northern District of Ohio, Eastern Division, in favor of the plaintiff be reversed and remanded for further proceedings.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Jan. 9, 1928

The defendant having this day come by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error intended to be urged

by it, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and [fols. 28-30] that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $500.00, subject to the approval of the Court, but if supersedeas desired, bond in penalty of $5,000.00 is required.

Bond on writ of error for $500.00, approved and filed January 12, 1928, omitted in printing.

[fol. 31] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed Jan. 12, 1928

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between John F. Guenther as plaintiff and United States Fidelity and Guaranty Company as defendant, a manifest error hath happened, to the great damage of the said United States Fidelity and Guaranty Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 11th day of February, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 12th day of January, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the United States of America the one hundred and fifty-second.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, by F. J. Denzler, Deputy Clerk. (Seal.)

[fol. 32] Allowed by D. C. Westenhaver, Judge of the District Court.

Return on writ of error omitted in printing.

[fols. 33 & 34] Citation, in usual form, showing service on Quigley & Byrnes, omitted in printing.

[fol. 35] IN UNITED STATES DISTRICT COURT

PRECIPE FOR TRANSCRIPT—Filed Jan. 11, 1928

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Record from Cuyahoga County Common Pleas Court.

Answer.

Reply.

---

* Not exceeding 30 days from the day of signing the citation.

Motion by defendant for judgment on pleadings.
Stipulation filed October 13, 1927.
Order overruling defendant's motion for judgment on pleadings.
Opinion of court on motion.
Leave to plaintiff to file amended reply.
Amended reply.
Motion by plaintiff for judgment on pleadings.
Stipulation of parties filed December 30, 1927.
Order granting plaintiff's motion for judgment on pleadings and entering judgment for plaintiff.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Bond.
Writ of error.
Return of Clerk to writ of error.
Citation.
Stipulation re certification of record.
Precipe for transcript.
Certificate of Clerk.
And deliver all papers to The Gates Legal Publishing Company for printing.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Service of the foregoing Precipe for Transcript is acknowledged this 11th day of January, 1928.

Quigley & Byrnes, Attorneys for Plaintiff. W. A. Kane.

[fol. 36] IN UNITED STATES DISTRICT COURT

STIPULATION RE CERTIFICATION OF RECORD—Filed Jan. 11, 1928

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause,

as set forth in the precipe for transcript, without further comparison by the clerk.

Quigley & Byrnes, Attorneys for Plaintiff. Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

[fols. 37 & 38] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] Appearance of counsel omitted in printing.

Minute entry of argument and submission omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Filed April 3, 1929

Error to the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed April 3, 1929

Before Hicks, Hickenlooper, and Knappen, Circuit Judges

HICKENLOOPER, Circuit Judge:

John F. Guenther, plaintiff below, recovered judgment against the United States Fidelity & Guaranty Co. upon a

policy of automobile insurance indemnifying him against loss and/or expense arising in consequence of any accident occur-ing within the limits of the United States and Canada by reason of the use of the automobile covered. Plaintiff was a resident of the city of Cleveland, Ohio. The accident occurred in the adjoining municipality of Lakewood while the automobile was being operated by an employee of the plaintiff who was more than sixteen years of age but less than eighteen. At the time of the accident an ordinance was in force in the city of Lakewood making it unlawful "for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of eighteen years to operate or run said motor vehicle upon public highways, streets or alleys in said city of Lakewood." The policy specifically provided: "This policy is subject to the following conditions: (A) The policy shall not cover any liability of the insured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event." It is here claimed that by reason of this provision of the policy and the existence of the ordinance no recovery can be had upon the policy.

Passing the contention that the ordinance does not "fix an age limit" for the operation of an automobile, per se, the sole remaining question for determination is one of construction, whether this phrase of the policy was intended to preclude liability where the age limit is fixed by municipal ordinance and no limit is fixed by state statute. Manifestly the provision is "to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular [fol. 41] sense." Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 463. But if the policy "is so drawn as to require interpretation, and to be fairly susceptible to two different constructions, the one will be adopted that is most favorable to the insured." Thompson v. Phenix Ins. Co., 136 U. S. 287, 297, citing National Bank v. Ins. Co., 95 U. S. 673, 678. See, also, Liverpool, etc., Ins. Co. v. Kearney, 180 U. S. 132, 136; Schambs v. Fidelity & Casualty Co., 259 Fed. 55 (C. C. A. 6); and O'Brien v. North River Ins. Co., 212 Fed. 102, 105 (C. C. A. 4). Resort cannot be had to this latter rule to nullify the plain and obvious provisions of an insurance policy. (Cf. Interstate Business Men's Ac-

cident Ass'n v. Lewis, 257 Fed. 241, 244 [C. C. A. 8]; Canton Ins. Office v. Independent Transp. Co., 217 Fed. 213 [C. C. A. 9]), but the question remains whether the language used is in fact susceptible to a double meaning or, otherwise expressed, whether it will fairly and reasonably support that construction upon which liability of the insurer may be sustained.

Judge Westenhaver, in his opinion in the court below, decided this question in the following language: "The expression 'by law' is at least susceptible of two constructions. It may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a state. Ordinarily, when one speaks of the 'law,' this is what is meant. One thus speaking, has in mind a rule of conduct of uniform and general application prescribed by the supreme law-making body of some sovereignty. Ordinarily, when one speaks of a law, one does not have in mind ordinances, by-laws, or regulations of a municipality. * * * The insurer, had it been intended to include municipal ordinances, could very easily have said so. In Cuyahoga County there are more than fifty municipalities having equal right to enact ordinances of the same nature as the one in question. It cannot be held that the contract contemplates that every insured should investigate and learn whether an ordinance fixing an age limit was in force in all these municipalities before entrusting his automobile to someone else." In this interpretation of the language used in the policy we concur.

It is earnestly contended that the Supreme Court of the United States, and this court, have repeatedly held that [fol. 42] the ordinances of a municipality, passed in the exercise of a power delegated to it by the state, are to be considered as laws of the state within the meaning of the constitutional provision that no state shall pass any law impairing the obligation of contracts, citing Iron Mountain R. Co. v. Memphis, 96 Fed. 113 (C. C. A. 6); Cumberland Tel. & Tel. Co. v. Memphis, 198 Fed. 955 (Three-judge case, Tenn.); New Orleans W. W. Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18. This doctrine is of but little assistance in the solution of our question for such question is not whether the language used would also reasonably support the inclusion of municipal ordinances fixing an age limit, but rather whether such language could not, as reasonably, be considered as relieving the company of liability only in cases

of violation of state legislation. For instances, where similar language was so limited to state enactment, see Fullwood v. Canton, 116 O. S. 732; Rosenberg v. Selma, 168 Ala. 195; Taylor v. Philadelphia, 261 Pa. 458; Wright v. Macon, 5 Ga. App. 750, 763; Royal Indemnity Co. v. Schwartz, 172 S. W. 581 (Tex. Civ. App. 1915) (semble contra).

The fact that the territory covered by the policy is specifically stated as within the limits of the United States and Canada, the myriad of separate municipalities within these territorial limits, the fact that the accident occurred in a municipality other than that of the residence of the plaintiff, the manifest double meaning of the words "by law," the use of these words in both senses in general parlance and judicial opinion, the fact that the state and not the municipality is the natural governmental unit under consideration by the parties when writing insurance, the fact that had it been intended to include municipal ordinances this could have been so easily stated, and the application of the rule of construction to be applied under such circumstances, constrain us to the opinion that liability is not avoided by the fact that the operator of the automobile was less than eighteen years of age. He was more than sixteen years of age and the policy fixes this age limit in the absence of other age limit "fixed by law." To hold as we here do, does not make inoperative any term or provision of [fol. 43] the policy but does construe the policy provisions in use in all the states as applying the age limit fixed by state-wide legislation, if any and if not less than sixteen years, but in the absence of state-wide legislation, as in Ohio, or if such legislation fixes a limit less than sixteen, then as providing that sixteen years shall be considered the applicable age limitation.

The judgment of the court below is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

KNAPPEN, Circuit Judge (dissenting):

I am unable to concur in the opinion of the majority. The policy expressly provides that it should not "cover any liability of the assured while the automobile is being operated by any person under the age limit fixed by law, or

under the age of sixteen years in any event." The municipal ordinance made it unlawful for any owner of a motor vehicle to permit "a minor under the age of eighteen years to operate or run said motor vehicle upon public highways, streets or alleys, in the city of Lakewood." I think that under the situation existing here the age limit was "fixed by law." Not only was there no state law otherwise governing the subject, but the legislature had expressly conferred upon municipalities "special power to regulate the use of the streets * * *," and had given the council "the care, supervision and control, of public highways, streets, avenues, alleys * * * within the corporation." Gen. Code Ohio, Sec. 3714. The ordinance in question is directly within the statutory authority. The assured was the owner of the automobile. As applied to this case, both the ordinance and the policy provision are aimed at the action of the same person. It is thus immaterial that the ordinance does not in terms make unlawful the actual driving on the part of one under eighteen years of age.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,310. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 179. United States Fidelity & Guaranty Company, petitioner, vs. John F. Guenther. Petition for writ of certiorari and exhibit thereto. Filed June 19, 1929. File No. 34,310.

FILE COPY

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 179

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER.

vs.

JOHN F. GUENTHER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

C. M. HORN,
Counsel for Petitioner.

(34,310)

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reason relied on for the allowance of the writ	4
Prayer for writ	5
Affidavits of counsel	5
Brief in support of petition for writ of certiorari	7
Argument	7
Summary of argument	9
1. The commonly accepted meaning of the word "law" includes municipal ordinances	9
2. Since in Ohio there is no statute regulating the minimum age of drivers of automobiles, and since municipal ordinances are the only laws upon that subject, the construction adopted by the court below would deprive an important provision of the policy of all meaning and effect, which is contrary to one of the fundamental principles of construction	10
3. The Supreme Court as well as the Circuit Court of Appeals and various State courts have held that municipal ordinances regulating the use of streets are laws and are included within the term "law".	11
Conclusion	16

Table of Cases Cited.

Cumberland Telephone & Telegraph Company v. City of Memphis, 198 Fed., 955	14
Imperial Fire Insurance Company v. Coos County, 151 U. S., 452	9
Iron Mountain R. Company v. Memphis, 96 Fed., 113	12
Mutual Life Insurance Company of New York (In re), 89 N. Y., 530	14
New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S., 18	12, 13
Royal Indemnity Company v. Stewart, 172 S. W., 581 (Texas Civil App., 1915)	15

Other Authorities Cited.

Blackstone's Commentaries	10
2 Cooley's Briefs on Insurance (2 Ed.), p. 963	11
General Code of Ohio, Sec. 3714	14
Webster's New International Dictionary	9

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 179

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER.

vs.

JOHN F. GUENTHER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, United States Fidelity and Guaranty Company, respectfully represents:

First. That your petitioner is and was at the times herein mentioned, a corporation under the laws of the State of Maryland and a citizen of said state with an office in the City of Cleveland, Ohio, where it is engaged in the general insurance business; that the respondent,

John F. Guenther, is and was at the times herein mentioned, a citizen of the State of Ohio, residing in or near Cleveland, Ohio, and doing business in the City of Lakewood, Ohio.

Second. That on February 15, 1925, your petitioner issued to the respondent an automobile liability insurance policy containing the following provision:

> "This policy is subject to the following conditions: (A) The policy shall not cover any liability of the insured while (the automobile is) being operated by any person under the age limit *fixed by law,* or under the age of sixteen years in any event."

Third. That during the policy period and prior thereto, the following ordinance was in full force and effect in the City of Lakewood, Ohio:

> "It shall be unlawful for any owner, bailee, lessee, or custodian of any motor vehicle, to permit a minor under the age of eighteen years to operate or run said motor vehicle upon the public highways, streets, or alleys in the said City of Lakewood."

Fourth. That thereafter during the policy period and while said ordinance was in effect, the respondent permitted a minor seventeen years of age to operate the respondent's motor vehicle upon the public streets of the City of Lakewood, and while said automobile was being so operated it struck and injured a person who thereafter sued the respondent. The respondent thereupon notified your petitioner to defend said law

suit, but your petitioner, claiming that its policy did not cover said accident because of the driver's age, refused to defend said law suit, whereupon the respondent defended the same at his own expense and paid the resulting judgment, said judgment and expenses amounting to $3,890.62.

Fifth. Thereupon the respondent brought the present action against your petitioner, and your petitioner in its answer set forth the aforesaid policy provision, the ordinance of the City of Lakewood, and the fact that respondent had permitted a minor seventeen years of age to operate his automobile in the City of Lakewood, and that said accident occurred while said automobile was being so operated. To this answer the respondent filed a reply admitting all of the allegations in the answer. Thereafter motions for judgment on the pleadings were filed by the respective parties and the District Court of the United States for the Northern District of Ohio sustained the motion of respondent and overruled the motion of your petitioner and entered judgment against your petitioner and for the respondent for $3,890.62.

Sixth. Thereupon your petitioner was allowed a writ of error to the Circuit Court of Appeals of the United States in and for the Sixth Circuit and a transcript of all the proceedings was duly filed therein, including assignments of error to the effect that said District Court erred in overruling your petitioner's motion for judgment on the pleadings, in sustaining respondent's motion for judgment on the pleadings,

and in entering judgment for the respondent. Thereafter said cause came on to be heard in the Circuit Court of Appeals for the Sixth Circuit before the Hon. Loyal E. Knappen and the Hon. Xenophon Hicks and the Hon. Smith Hickenlooper, and on the third day of April, 1929, said Court (Judge Knappen dissenting) affirmed the judgment of the District Court.

Seventh. That the action and proposition of law involved in this case is substantially as follows:

> "Does the term, 'fixed by law,' as used in the insurance policy quoted from in paragraph Second hereof, include a municipal ordinance, making it unlawful for the owner of an automobile to permit a minor under eighteen years of age to operate it on the public streets of the municipality?"

Eighth. Your petitioner further says that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reason:

> Because the Circuit Court of Appeals has decided an important question of general law in a way which is probably untenable, in that it held that a municipal ordinance is not a law as that term is used in the policy in question.

Ninth. Your petitioner believes that said judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the cause to be certified to it for its review and determination under the Act of Congress in such cases made and provided.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of the Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in the Circuit Court of Appeals had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by the Act of Congress in such cases made and provided, and that said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and for such other and further relief as may seem proper.

And your petitioner will ever pray.

UNITED STATES FIDELITY & GUARANTY COMPANY,

By C. M. HORN,
Counsel for Petitioner.

THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO.

STATE OF OHIO,
Cuyahoga County, ss:

C. M. Horn, being first duly sworn, says that he is of counsel for United States Fidelity and Guaranty Company, the petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

C. M. HORN.

Sworn to before me by the said C. M. Horn and by him subscribed in my presence this tenth day of June, 1929.

FRED J. PERKINS,
Notary Public.

My commission expires April 6, 1932.

THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO.

STATE OF OHIO,
Cuyahoga County, ss:

I, Alton C. Dustin, attorney and counsellor at law, hereby certify that I have examined the foregoing petition for a writ of certiorari; that the same is not made for the purpose of delay, and that in my opinion said petition is meritorious and well founded in law and ought to be granted.

ALTON C. DUSTIN.

Sworn to before me by the said Alton C. Dustin and by him subscribed in my presence this tenth day of June, 1929.

FRED J. PERKINS,
Notary Public.

My commission expires April 6, 1932.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 179

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER,

vs.

JOHN F. GUENTHER, RESPONDENT.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In Ohio, as in many other states of the Union, there is no State statute prescribing the minimum age of operators of automobiles. Thus it is left open for each municipality to prescribe the minimum age by ordinance. The decision of the Circuit Court of Appeals in the case at bar (Judge Knappen dissenting) holds that such municipal ordinances are not laws and are not included within the term "fixed by law" as that phrase is used in automobile liability insurance

policies where coverage is dependent upon the operator being within the legal age.

The widespread effect of the decision of the Circuit Court of Appeals is recognized in the majority opinion, where it is stated that the ruling of the Court "does construe the policy provisions *in use in all the states.*" In other words, the policy involved is a standard-form policy and the provision construed by the courts below is to be found in practically every automobile liability insurance policy in effect in the entire United States. The majority opinion holds that these ordinances regulating the age of drivers are not laws and do not come within the content and meaning of the policy provision "fixed by law." On the contrary, Judge Knappen was of the opinion that these ordinances were laws within the meaning of the policy, and that the minimum age which they prescribe was therefore "fixed by law."

Because of the admittedly widespread effect of this decision, because it construes an important clause in a standard form of policy held by many hundreds of thousands of automobile owners, because the correctness of the holding that municipal ordinances are not laws is challenged by so distinguished a jurist as Judge Knappen and seems at variance with what lawyers generally regard the term "law" as including, we respectfully ask that the petition be granted, so that the question may be settled by the pronouncement of this Court.

1. The commonly accepted meaning of the word "law" includes municipal ordinances.

In *Imperial Fire Insurance Company vs. Coos County*, 151 U. S. 452, the Supreme Court said (p. 463):

> "Contracts of insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

In determining, therefore, the "plain, ordinary, and popular" meaning of the word "law" as used in the policy, it is entirely proper to refer to the definition of the word "law" as it appears in Webster's New International Dictionary. It is there defined to be—

> "A rule of external conduct or action which is prescribed, or is formally recognized as binding, by the supreme governing authority and is enforced by a sanction. In this sense the term 'law' includes any edict, decree, rescript, order, *ordinance*, statute, resolution, rule, judicial decision, usage, etc., which is made or recognized and enforced by the controlling authority."

It is well known that automobile traffic within municipalities is regulated and controlled largely by ordinances which are known as the traffic laws. Such, for instance, are those ordinances requiring automobilists to stop behind a street car when it is taking on or discharging passengers, to come to a stop before entering a main thoroughfare, to operate their automobiles in a reasonable and careful manner with due

regard for the width and condition of the streets, and others of a similar character. No one would argue that the word "law" in its ordinary, everyday meaning does not include such ordinances, and it is difficult to see why an ordinance making it unlawful for the owner of an automobile to permit a minor under the age of eighteen years to operate the same upon the public streets of a municipality should not likewise be classified as a law as that term is used in the policy in question.

Looking to the legal definition of the term "law," it is defined in Blackstone's Commentaries as—

> "A rule of action which is prescribed by some superior, and which the inferior is bound to obey."

The ordinance in question complies with both of these conditions, and we therefore submit that both in its legal and in its popular definition the word "law" as used in the policy, when properly construed, clearly includes and embraces the ordinance in question.

2. Since in Ohio there is no statute regulating the minimum age of drivers of automobiles, and since municipal ordinances are the only laws upon that subject, the construction adopted by the court below would deprive an important provision of the policy of all meaning and effect, which is contrary to one of the fundamental principles of construction.

It is alleged in the amended reply that "the Legislature of the State of Ohio has never enacted any law fixing the age limit of operators of automobiles."

Hence the only laws regulating the minimum age of drivers of automobiles are to be found in municipal ordinances such as the one in question. The policy does not cover "any liability of the assured while the automobile is being operated by any person under the age limit *fixed by law.*" Therefore, if the term "fixed by law" does not include municipal ordinances, which are the only source of law upon the subject, this important provision of the policy is deprived of all meaning and effect. Such a construction is erroneous because it violates a well-recognized rule of construction. The rule is stated in *2 Cooley's Briefs on Insurance* (2 ed.), p. 963, as follows:

> "Every part of the contract should be considered in arriving at an interpretation thereof, and no part of the words of a policy should be rejected as insensible or inoperative if a rational and intelligible meaning can be given to them, consistent with the general design and object of the whole instrument."

3. The Supreme Court as well as the Circuit Court of Appeals and various State courts have held that municipal ordinances regulating the use of streets are laws and are included within the term "law."

In the opinion of the courts below a distinction was drawn between the laws of the State and the ordinances of a municipality and they held that the term "law" as used in this insurance policy refers only to State laws and does not include municipal ordinances.

We respectfully submit that this view is untenable and that the term "fixed by law" includes all valid

legislation enacted by a legislative body acting within the scope of its powers. However, even if the distinction were valid, it is well established that when a municipality regulates the use of its streets it does so by the authority delegated to it by the State and that its action is therefore Sate action and its ordinances in effect are State laws.

Thus in *Iron Mountain R. Company vs. Memphis,* 96 Fed. 113, the General Assembly of the State of Tennessee had passed a law providing that the City of Memphis should "have and exercise complete and perfect control over all the streets, squares and other property of the city." Thereafter the City of Memphis made a contract with the Iron Mountain Railroad Company, giving it certain trackage rights in said streets which the Railroad Company exercised by the laying of tracks. Subsequently the City of Memphis passed an ordinance declaring said trackage rights forfeited, and the question then arose whether this municipal ordinance was a law of the State of Tennessee which impaired the obligation of the contract between the Railroad Company and the City, and hence violated that provision of the Federal Constitution declaring that no State should pass any law impairing the obligation of contracts. (It was essential to the court's jurisdiction that this be held to be a law of the *State* of Tennessee. See *N. O. Waterworks vs. La. Sugar Co.,* 125 U. S. 18, 30.)

This Court held that the ordinance of the City of Memphis was in fact a law of the State of Tennessee because it was enacted under the general power given

to the City by the Legislature of the State for the control of the streets.

The Court, speaking through Judge Taft, said (pp. 120 *et seq.*):

> "In the control of the streets * * * the city is acting as trustee, not alone for the citizens and residents of the city, but as trustee for the public at large, *and is exercising a power delegated to it by the state and in the exercise of such a power is necessarily therefore a state agency.* * * * It could only use the police force in its governmental capacity as a branch of the state government. * * * With respect to the occupancy of the street however, which it controls by virtue of its being an agent of the state and a trustee for the public, its action in depriving persons having vested property rights in the streets will, if without due process of law, be state action within the inhibition of the Fourteenth Amendment."

In *New Orleans Waterworks Co. vs. Louisiana Sugar Refining Company,* 125 U. S. 18, the Supreme Court, speaking through Mr. Justice Gray, had previously said (p. 31):

> "So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state having all the force of law within the limits of a municipality, that it may properly be considered as a law within the meaning of this article of the Constitution of the United States."

And in *Cumberland Telephone & Telegraph Company vs. City of Memphis,* 198 Fed. 955, in a decision participated in by his Honor Judge Denison, it was said (p. 956):

> "It is well settled that a city ordinance may be considered a law of the state within the meaning of the constitutional provision that no state shall pass any law impairing the obligation of contracts."

These decisions are entirely applicable to the case at bar for the reason that Section 3714 of the General Code of Ohio specifically provides that:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of the public highways, streets, avenues, alleys * * * within the corporation."

It therefore follows that in enacting the ordinance making it unlawful for any owner of any motor vehicle to permit a minor under the age of eighteen years to operate it on the streets of the City of Lakewood, said city was exercising a power directly conferred upon it by the State of Ohio, and hence its action was in fact and in law the action of the State of Ohio.

In *In re Mutual Life Insurance Company of New York,* 89 N. Y. 530, the Court of Appeals held that a grade fixed by municipal ordinance was fixed by law, saying (p. 533):

> "An ordinance of the Common Council regularly passed and within the scope of the authority conferred upon it by the Legislature is a law. That it is local and not general in its operation does not alter the inherent character or modify its binding effect. *A grade fixed by such ordinance is fixed by law.*"

It has also been held that a person under the age of eighteen years who is operating an automobile, when that is the minimum age fixed by a municipal ordinance, is operating it in violation of law within the meaning of a policy provision to that effect. Thus in *Royal Indemnity Company vs. Stewart,* 172 S. W. 581 (Texas Civil App. 1915), it was held that:

> "Where a city ordinance made it unlawful for any person under eighteen years of age to drive an automobile within the city limits, and plaintiff's automobile while being driven by his sixteen-year-old son ran over and killed a child, a provision of defendant's indemnity policy that it did not cover losses sustained while the automobile was being operated in violation of law was sufficient to protect the insurer from loss on account of the death of the child, and from liability to pay costs recovered of the insured if the ordinance was valid in fact."

If, therefore, municipal ordinances of this kind are to be regarded as laws of the State itself within the meaning of the term "law" as used in the Constitution, how can it be successfully denied that the same ordinance is included within the meaning and content of the term "law" as used in the insurance policy in question? What necessity or what reason exists for

any substantial difference in the meaning and content of the term "law" as used in the two cases? To hold that the word "law" as used in the insurance policy does not include municipal ordinances is to unnecessarily limit its real meaning both in the ordinary and in the legal sense and amounts to saying that that is not law which everyone accepts as law and which is daily enforced as such in our courts, both civil and criminal.

Conclusion.

In conclusion we respectfully submit that the majority opinion of the Circuit Court of Appeals holding that municipal ordinances fixing the minimum age of automobile drivers on the public streets do not come within the term "fixed by law" announces a view which is at variance with the proper construction of that term. We further submit that the correct view is expressed in the dissenting opinion of Judge Knappen, and that an ordinance making it "unlawful" for an owner to permit his automobile to be driven by a minor under eighteen years of age clearly falls within the term "fixed by law."

Because of the widespread effect of the decision as recognized by the Court itself, and because we believe that the view announced is incorrect in law, we respectfully ask that the petition for the writ of certiorari be granted.

Respectfully submitted,

C. M. HORN,
Counsellor for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 179.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

vs.

JOHN F. GUENTHER,
Respondent.

BRIEF OF PETITIONER.

CLINTON M. HORN,
Terminal Tower,
Cleveland, Ohio,
Counsel for Petitioner.

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INDEX.

I. The Opinions of the Courts Below 1

II. Jurisdiction 1

III. Statement of the Case 2

IV. Specification of Errors 4

Summary of Argument 4

V. Argument:

The Term "Fixed by Law" as Used in the Policy Includes the Municipal Ordinance of Lakewood Which Made it Unlawful for Guenther to Permit His Automobile to be Operated by a Person Under Eighteen Years of Age. Hence, the Policy by its Own Terms, Did Not Cover the Accident in Question 5

1. The word "law" in its ordinary, popular sense includes municipal ordinances 5

2. In its legal significance the term "fixed by law" includes municipal ordinances 7

3. Even if we accept the distinction drawn by the courts below between municipal ordinances and state statutes, nevertheless the decisions of this Court hold that municipal ordinances regulating the use of city streets are in effect state laws, because they are passed by virtue of the control vested by the State in the municipality over its streets 9

4. Discussion of the reasons advanced by the courts below in holding that an ordinance is not a law 13

5. Discussion of opposing counsel's contention as to the effect of section 13002 of the Ohio General Code 16

VI. Conclusion 18

Appendix—Offenses Against Minors 19

Authorities Cited.

Blackstone's Commentaries 7

Canton Insurance Office, Ltd. vs. Independent Transportation Company, 217 Fed. 213, 214 15

Cumberland Telephone & Telegraph Company vs. City of Memphis, 198 Fed. 955 12

Heidle vs. Baldwin, 118 O. S. 375 17

Imperial Fire Insurance Company vs. Coos County, 151 U. S. 452 .....5, 13

Interstate Business Men's Accident Association vs. Lewis, 257 Fed. 241, 244 15

Iron Mountain Railroad Company vs. Memphis, 96 Fed. 113 10

In re Mutual Life Insurance Company of New York, 89 N. Y. 530 8

New Orleans Waterworks Company vs. Louisiana Sugar Refining Company, 125 U. S. 18 .....10, 11

Royal Indemnity Company vs. Stewart, 172 S. W. 581 9

United States Fidelity and Guaranty Company vs. Guenther, 31 F. (2d) 919 1

Williams vs. Bruffy, 96 U. S. 176 .....10, 14

General Code of Ohio, Section 3714 12

General Code of Ohio, Section 13002 (Set out in full in Appendix, page 19) 16

General Code of Ohio—Offenses against Minors—Sections Relating Thereto, (See Appendix) 19

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BRIEF OF PETITIONER.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinions (majority and dissenting) in the Circuit Court of Appeals for the Sixth Circuit are reported in *United States Fidelity and Guaranty Company vs. Guenther,* 31 F. (2d) 919. They are to be found on pages 21-25 of the Record herein. The opinion of the District Court was not officially reported, but may be found on pages 11-13 of the Record herein.

II.

JURISDICTION.

The jurisdiction of this Court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938.

The date of the judgment to be reviewed is April 3, 1929 (R. 21). The petition for writ of certiorari was filed June 19, 1929 (R. 25), and was granted October 21, 1929 (R. 25).

III.

STATEMENT OF THE CASE.

On February 15, 1925, the United States Fidelity and Guaranty Company issued to John F. Guenther an automobile insurance policy insuring him against loss arising out of the operation of his automobile. By the express exclusion hereinafter quoted, the policy did not protect Guenther while the automobile was being operated by any person under the age limit fixed by law. During the policy period the insured automobile, while being used on Guenther's business, injured one Kroeger in the City of Lakewood, Ohio. Thereupon Kroeger sued Guenther for damages, and Guenther requested the Company to defend the case.

Meanwhile, the Insurance Company had learned that at the time of the accident Guenther's automobile was being operated by Winter, a young man under eighteen years of age. Because it regarded Guenther's act of entrusting the operation of his automobile to a person under the age limit fixed by the Lakewood ordinance, as excluding this accident from coverage under the policy, the Insurance Company disclaimed liability on the ground of non-coverage, and hence refused to defend the personal injury action, whereupon Guenther retained his own counsel to defend the case. At the trial Kroeger, the injured party, recovered a judgment against Guenther for $2,750 and costs. Guenther, a resident of Ohio, paid the judgment and then brought suit against the Insurance Company, a resident of Maryland, to recover the aggregate amount of the judgment, expenses and attorneys' fees, to-wit, $3,890.62. The requisite diversity of citizenship existing and the suit involving more than $3,000, the Insurance Company removed the case to the United States District Court for the Northern District of Ohio and set up in its answer the exclusion clause of the policy which read as follows:

"This policy is subject to the following conditions: (A) The policy shall not cover any liability of the Assured while (any of the insured automobiles is) being operated by any person under the age limit fixed by law or under the age of sixteen (16) years in any event." (R. 8, 10)

The answer also alleged that prior to the time the policy was issued, the Council of the City of Lakewood had duly enacted a certain ordinance which was in full force and effect on the day of the accident, said ordinance reading as follows:

"It shall be unlawful for any owner, bailee, or custodian of any motor vehicle to permit a minor under the age of 18 years to operate or run said motor vehicle upon the public highways, streets or alleys in said City of Lakewood." (R. 9)

The answer further alleged that Guenther, the owner of one of the automobiles described in the policy, did on the 14th day of May, 1925, permit his employe Winter, a minor under the age of eighteen years, to operate and run a certain motor vehicle upon the public highways and streets of the City of Lakewood, and that said automobile was being operated by Winter with Guenther's consent and permission at the time of the accident in question (R. 9).

The amended reply admitted these allegations of the answer and alleged that while Winter, the operator, was under eighteen years of age, he was in fact seventeen years old at the time of the accident (R. 14).

Both parties moved for judgment on the pleadings, and the District Court overruled the Insurance Company's motion and granted Guenther's motion, and thereupon entered judgment against the Insurance Company for $3,655.62 and costs (R. 16).

The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Sixth Circuit, his

Honor, Judge Knappen dissenting (R. 21-25). Thereafter the Insurance Company filed its petition for writ of certiorari, which was allowed by this Court on October 21, 1929 (R. 25).

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the term "fixed by law" as used in said insurance policy, did not include a municipal ordinance making it unlawful for the owner of an automobile to permit a minor under eighteen years of age to operate it on the public streets of the municipality.

2. The Circuit Court of Appeals erred in affirming the judgment of the District Court and in refusing to enter final judgment in favor of the petitioner.

SUMMARY OF ARGUMENT.

The term "fixed by law" as used in the policy includes the municipal ordinance of Lakewood which made it unlawful for Guenther to permit his automobile to be operated by a person under eighteen years of age. Hence, the policy by its own terms, did not cover the accident in question.

1. The word "law" in its ordinary, popular sense includes municipal ordinances.

2. In its legal significance the term "fixed by law" includes municipal ordinances.

3. Even if we accept the distinction drawn by the courts below between municipal ordinances and state statutes, nevertheless the decisions of this Court hold that municipal ordinances regulating the use of city streets are in effect state laws, because they are passed by virtue of

the control vested by the State in the municipality over its streets.

4. Discussion of the reasons advanced by the courts below in holding that an ordinance is not a law.

5. Discussion of the opposing counsel's contention as to the effect of section 13002 of the Ohio General Code.

V.

ARGUMENT.

THE TERM "FIXED BY LAW" AS USED IN THE POLICY INCLUDES THE MUNICIPAL ORDINANCE OF LAKEWOOD WHICH MADE IT UNLAWFUL FOR GUENTHER TO PERMIT HIS AUTOMOBILE TO BE OPERATED BY A PERSON UNDER EIGHTEEN YEARS OF AGE. HENCE, THE POLICY BY ITS OWN TERMS, DID NOT COVER THE ACCIDENT IN QUESTION.

The sole question involved is whether the language of the policy, excluding the insured from coverage if the automobile "was being operated by any person under the age limit fixed by law," includes the Lakewood ordinance set forth above. In other words, does the term "fixed by law" as used in this policy, embrace and include the municipal ordinance? We contend that it does, and for the following reasons:

1. The word "law" in its ordinary, popular sense includes municipal ordinances.

That the word "law" as used in this policy is to be understood in its "plain, ordinary and popular sense" is settled by the decision of this Court in *Imperial Fire Insurance Company vs. Coos County*, 151 U. S. 452, where the Court said (p. 463):

> "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the

> terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

In determining, therefore, the "plain, ordinary and popular" meaning of the word "law" as used in the policy, it is entirely proper to refer to the definition of the word as it appears in Webster's New International Dictionary. It is there defined to be—

> "A rule of external conduct or action which is prescribed or is formally recognized as binding by the supreme governing authority and is enforced by sanction. In this sense the term 'law' includes any edict, decree, rescript, order, **ordinance**, statute, resolution, rule, judicial decision, usage, etc., which is made or recognized and enforced by the controlling authority."

It is well-known that automobile traffic within municipalities is regulated and controlled largely by ordinances known as traffic laws. Such, for instance, are those ordinances regulating the turning, stopping and parking of automobiles; requiring them to stop behind a street car when it is taking on or discharging passengers, and to come to a full stop before entering a main thoroughfare; forbidding one to operate an automobile while intoxicated, and other ordinances of a similar character. These ordinances are enforced by a sanction and the violation of any of them subjects the offender to a fine and perhaps to imprisonment. The recognition and enforcement of these ordinances in our courts, both civil and criminal, is an everyday occurrence and no one can deny that they have the force of law. No one can maintain that the word "law" in its ordinary, everyday meaning does not include such ordinances, and it is therefore difficult to see why an ordinance declaring that "it shall be unlawful for any owner of any motor vehicle to permit a minor under the

age of eighteen years to operate it upon the public highways of the City of Lakewood" should not likewise be classified as a law as that term is used in the policy.

2. In its legal significance the term "fixed by law" includes municipal ordinances.

Not only in its popular meaning does the term "fixed by law" include municipal ordinances, but consideration of the *legal* meaning of the term leads to the same result.

In *Blackstone's Commentaries* law is defined as—

> "A rule of action which is prescribed by some superior and which the inferior is bound to obey."

Prior to the accident in question the Council of the City of Lakewood had declared to every owner of automobiles operated upon its streets that "it shall be unlawful" for him to permit his automobile to be operated by a minor under the age of eighteen years. That ordinance constituted "a rule of action" which Guenther was bound to obey but which, on the contrary, he disobeyed. The ordinance therefore satisfied the requirements of the above definition.

Moreover, it will be observed that the term "fixed by law" found in the policy is used in its broad, generic sense. It does not say "fixed by **a** law," but rather "fixed by **law**," evidently referring to the whole body of law from whatever source originating. Coverage is negatived if the automobile was operated by any person "under the age limit fixed by law." Obviously that means the age limit fixed by that legislative body or other authority in which was vested by law the power to determine the age of drivers. Such body under the laws of Ohio was the council of the municipality, and hence when the Council of Lakewood exercised the power thus conferred, its enactment in the form of the ordinance became the law for that

municipality, and the age thus designated became the age "fixed by law." This conclusion is recognized by the ordinance itself, for the very first words of the section are "It shall be unlawful." No question is raised as to the legal effectiveness of the ordinance, nor is it claimed that it did not impose a binding obligation upon Guenther. If the age limit fixed in the ordinance was not "fixed by law," by what means then was it fixed, and what is the meaning of the opening words of the section "It shall be unlawful"? It is our contention that the phrase "fixed by law" as used in this policy, includes all enactments of any public legislative body acting within the limits of its powers and fixing the minimum age of automobile drivers, whether such enactments are passed by the Legislature of the State, or by the council of a municipality. Whatever the agency chosen to express the will and to exercise the power, its declarations have the force of law, and the age limit of drivers fixed by its enactments is an age limit "fixed by law."

Judicial recognition of this is found in at least two reported cases.

In *In re Mutual Life Insurance Company of New York*, 89 N. Y. 530, the Court of Appeals held that a grade fixed by municipal ordinance was fixed by law, saying (p. 533):

> "An ordinance of the Common Council regularly passed and within the scope of the authority conferred upon it by the Legislature is a law. That it is local and not general in its operation does not alter its inherent character or modify its binding effect. *A grade fixed by such ordinance is fixed by law.*"

It has also been held that a person under the age of eighteen years who is operating an automobile, when that is the minimum age fixed by a municipal ordinance, is operating it in violation of law within the meaning of a policy provision to that effect. Thus in *Royal Indemnity*

Company vs. Stewart, 172 S. W. 581 (Texas Civil App. 1915), it was held that:

> "Where a city ordinance made it unlawful for any person under eighteen years of age to drive an automobile within the city limits, and plaintiff's automobile while being driven by his sixteen-year-old son ran over and killed a child, a provision of defendant's indemnity policy that it did not cover losses sustained while the automobile was being operated in violation of law was sufficient to protect the insurer from loss on account of the death of the child, and from liability to pay costs recovered of the insured, if the ordinance was valid in fact."

3. Even if we accept the distinction drawn by the courts below between municipal ordinances and state statutes, nevertheless the decisions of this Court hold that municipal ordinances regulating the use of city streets are in effect state laws, because they are passed by virtue of the control vested by the State in the municipality over its streets.

In the opinions of the courts below, a distinction is drawn between the laws of the State and the ordinances of a municipality, and the holding was made that the term "fixed by law" in this insurance policy refers to state laws and does not include municipal ordinances. We submit that this distinction does not furnish the correct guide in determining what the parties to this contract of insurance meant by their use of the term "fixed by law." As already stated, we believe that the term includes all valid legislation enacted by a legislative body acting within the scope of its powers.

However, if the meaning and content of the term "fixed by law" be restricted to state statutes, it is nevertheless, well established by the decisions of this Court and of the Court below that when a municipality does regulate

the use of its streets,—and that is what the City of Lakewood was plainly doing by the ordinance in question,—it does so by virtue of authority delegated to it by the State and its action in such respect is therefore held to be State action and its ordinances State laws.

Thus in considering the nature of legislation, which, it was claimed, violated the constitutional provision that no State should pass any law impairing the obligation of contracts, it has been held that municipal ordinances are in legal effect State statutes, because the municipality was a State agency exercising power delegated to it by the State.

Hence in *New Orleans Waterworks Company vs. Louisiana Sugar Refining Company*, 125 U. S. 18, this Court, speaking through Mr. Justice Gray, said (p. 31):

> "So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State having all the force of law within the limits of a municipality, that it may properly be considered as a law within the meaning of this article of the Constitution of the United States."

And in *Williams vs. Bruffy*, 96 U. S. 176, this Court, speaking through Mr. Justice Field, said (p. 183):

> "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court."

The application of this thought is still more clearly brought out in the case of *Iron Mountain Railroad Company vs. Memphis*, 96 Fed. 113. The General Assembly of the State of Tennessee had passed a law providing that the City of Memphis should "have and exercise complete and perfect control over all the streets, squares, and other

property of the city." Thereafter the City of Memphis made a contract with the Iron Mountain Railroad Company, giving it certain trackage rights in said streets which the Railroad Company exercised by the laying of tracks. Subsequently the City of Memphis passed an ordinance declaring said trackage rights forfeited, and the question then arose whether this municipal ordinance was a law of the State of Tennessee which impaired the obligation of the contract between the Railroad Company and the City, and hence violated that provision of the Federal Constitution declaring that no State should pass any law impairing the obligation of contracts. (It was essential to the court's jurisdiction that this be held to be a law of the *State* of Tennessee. See *N. O. Waterworks vs. La. Sugar Co.*, 125 U. S. 18, 30, *supra.*)

The Court held that the ordinance of the City of Memphis was in fact a law of the State of Tennessee because it was enacted under the general power given to the City by the Legislature of the State for the control of the streets.

Speaking through his Honor, Judge Taft, the Court said (pp. 120 *et seq.*):

> "*In the control of the streets* * * * *the city* is acting as trustee, not alone for the citizens and residents of the city, but as trustee for the public at large, and *is exercising a power delegated to it by the state and in the exercise of such a power is necessarily therefore a state agency.* * * * It could only use the police force in its governmental capacity as a branch of the state government. * * * With respect to the occupancy of the street, however, which it controls by virtue of its being an agent of the state and a trustee for the public, its action in depriving persons having vested property rights in the streets will, if without due process of law, be state action within the inhibition of the Fourteenth Amendment."

And in *Cumberland Telephone & Telegraph Company vs. City of Memphis,* 198 Fed. 955, in a decision participated in by his Honor, Judge Denison, it was said (p. 956):

> "It is well settled that a city ordinance may be considered a law of the state within the meaning of the constitutional provision that no state shall pass any law impairing the obligation of contracts."

These decisions are entirely applicable to the case at bar for the reason that Section 3714 of the General Code of Ohio specifically provides that:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of the public highways, streets, avenues, alleys * * * within the corporation."

It therefore follows that in enacting the ordinance making it unlawful for any owner of any motor vehicle to permit a minor under the age of eighteen years to operate it on the streets of the City of Lakewood, said city was exercising a power directly conferred upon it by the State of Ohio, and hence its action was in fact and in law the action of the State of Ohio.

Reasoning by analogy, therefore, if municipal ordinances of this kind are to be regarded as laws of the state itself within the meaning of the term "law" as used in the Constitution, it would seem to follow that the term when used in an insurance contract, should include similar ordinances. In other words, if municipal ordinances regulating the use of streets are State statutes and are regarded as such after the rigid scrutiny given by this Court in a matter involving its constitutional jurisdiction, why then, are they not equally to be regarded as State statutes, and

hence falling within the restricted limits of the term "law" as defined by the courts below? If they constitute "law" for one purpose, why do they not for the other?

4. Discussion of the reasons advanced by the courts below in holding that an ordinance is not a law.

An examination of the opinions rendered by the courts below discloses two, or perhaps three, reasons given for the conclusions reached. These we desire briefly to discuss.

The first is that where there are two constructions that may be given to a condition exempting the insurer from liability, the court will adopt that one which is most favorable to the insured, this being known as the rule of strict construction against the insurer.

We do not question the existence of this rule, but we do question its applicability to the case at bar. The rule itself is subject to limitations. In *Imperial Fire Insurance Company vs. Coos County,* 151 U. S. 452, the Supreme Court said (pp. 462-3):

> "It is settled, as laid down by this court in *Thompson vs. Phenix Ins. Co.,* 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.
>
> "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

We submit, that the term "fixed by law" as used in the insurance policy here involved is not ambiguous but

includes any law, whether state or local, which has been duly enacted by the governing body, and which citizens are bound to respect and obey. The content of the term "law" is certainly not exhausted by the statutes of the state. Nor can an ambiguity be brought into existence where none already exists, by reasoning that the term "law" "may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a State" (R. 12). The answer to this is that the phrase "fixed by law" refers to and includes the whole body of law "from whatever source originating" (*Williams vs. Bruffy*, 96 U. S. 176, 183). To hold otherwise would be to ignore the Federal statutes, as well as municipal ordinances, all of which are admittedly laws enforced by a sanction, the same as are the statutes of the state.

The conclusion of the courts below seems also to be based in part upon the fact that the courts take judicial notice of the statutes of a state but not of ordinances. Here again, we submit, that the court adopted a test which is not the proper criterion. Even if the policy had specifically mentioned ordinances, the courts would not take judicial notice of them, but they would have to be pleaded and proved, the same as any other evidence of which the court does not take judicial notice. The matter of judicial notice is one concerning evidence and not substantive law, and we therefore contend that the taking or the not taking of judicial notice of any given enactment is wholly inconclusive as a test of what is law and what is not law.

The true test is whether in its "plain, ordinary and popular sense" the language of this policy excluding coverage while the automobile "was being operated by any person under the age limit fixed by law" embraced and included the ordinance of the City of Lakewood making it *unlawful* to so operate this automobile. The test is, would an ordinarily intelligent person regard such a law as being

referred to and comprehended within the language of the policy, for as was said by the Circuit Court of Appeals for the Ninth Circuit in *Canton Insurance Office, Ltd. vs. Independent Transportation Company,* 217 Fed. 213, 214:

> "A court should give to a written contract (insurance policy) that reasonable construction which it is to be assumed intelligent business men would give it."

We respectfully submit that there is no ambiguity in the term "fixed by law" and that this was not a proper case for the application of the rule of strict construction against the insurer, for as was said by the Circuit Court of Appeals for the Eighth Circuit in *Interstate Business Men's Accident Association vs. Lewis,* 257 Fed. 241, 244:

> "The rule that, where an insurance contract is doubtful as to its meaning in some particular, the doubt should be resolved against the insurer, cannot be used to strike down a clause of a contract when the meaning thereof is reasonably clear."

The District Court also pointed out that—

> "In Cuyahoga County there are more than fifty municipalities having equal rights to enact ordinances of the same nature as the one in question. It cannot be held that the contract contemplates that every insured should investigate and learn whether an ordinance fixing an age limit was in force in all these municipalities before entrusting his automobile to someone else."

As bearing upon that point of view, we advance the thought that if an automobile owner sees fit to entrust an automobile truck to a seventeen-year-old boy (as this driver was) to make commercial deliveries upon the crowded thoroughfares of a city, certainly he should not be heard to say that he did not know there was a law establishing a minimum age limit and had no time to find it out.

If he wants his automobile trucks driven by persons so youthful as to make it reasonably probable that they are under the age limit, it certainly imposes no unjust burden upon him to take the consequences of his own unlawful act. Guenther, the respondent, admittedly violated the law of the City of Lakewood in letting this boy drive his truck, and why any stricter construction should be given to this language of an insurance policy than is given to a criminal ordinance itself, is beyond our comprehension. Nor is it to be supposed that in the more than fifty municipalities in Cuyahoga County is there any substantial variation in the minimum age of operators of automobiles. At any rate, we repeat that if truck owners see fit to employ mere boys to drive their trucks, it does not lie in their mouths to assert ignorance of the law. Such a defense would be invalid in a prosecution for the violation of the ordinance, and it should likewise be regarded as invalid here.

5. Discussion of opposing counsel's contention as to the effect of section 13002 of the Ohio General Code.

In the respondent's brief filed in opposition to the petition for writ of certiorari, opposing counsel (pp. 2-3) make the contention that section 13002 of the Ohio General Code establishes a state-wide minimum age of sixteen years, and urge that since the driver in question was seventeen years of age, coverage was not excluded. There are several conclusive answers to such a contention.

First of all, their contention is strikingly inconsistent with the allegation in their reply and amended reply filed in the District Court (R. 10, 14), where they allege "that the Legislature of the State of Ohio has never enacted any law fixing the age limit of the operators of automobiles." This case comes up on the pleadings, and counsel are certainly bound by their own allegations.

But secondly, when the brief excerpt from section 13002 of the General Code of Ohio (see respondent's brief, pp. 2-3) is read in its context, it will be seen that this did not establish a state-wide minimum age, but was merely a law passed for the protection of minors themselves. It is found in the chapter entitled "Offenses Against Minors." The titles of the preceding sections, and section 13002 in its entirety, are printed as an appendix to this brief, and plainly show that the legislation was not passed as a measure establishing a state-wide minimum age limit for drivers, but as a measure of safety to children.

Thirdly, the mere fact that the Legislature of the State saw fit to prohibit a child under sixteen from being employed to operate an automobile, does not negative or impair the right of a municipality in the exercise of its police power to make it unlawful for an owner to permit his automobile to be driven by a minor under eighteen years of age. The Lakewood ordinance does not in any way conflict with section 13002, and the right of the city to establish a higher age if it so desires, can not be questioned. Indeed, the Supreme Court of Ohio has so held. In *Heidle vs. Baldwin*, 118 O. S. 375, where the right of a city to pass an ordinance requiring a vehicle to come to a full stop before entering a main thoroughfare was under consideration (the state statute not making such a requirement and imposing a lesser degree of care), the Supreme Court of Ohio, speaking through its Chief Justice, said (p. 385 *et seq.*):

> "The city had a right to adopt additional regulations, and the requirement to stop is not questioned as a valid exercise of the police power. * * * In the city of Piqua the ordinance imposes a greater obligation upon drivers on intersecting streets than is imposed by the state law, and the city has a right to impose such additional obligation."

VI.

CONCLUSION.

In conclusion, we respectfully submit that the language in question was unambiguous and clearly includes the ordinance referred to; that by reason of his own violation of that ordinance Guenther, the respondent, excluded himself from coverage under the policy; that the Insurance Company was fully justified in disclaiming liability for the defense of the case arising out of this accident; that the petitioner's motion for judgment on the pleadings was well taken, and should have been sustained, and that the judgment of the Courts below should be reversed and final judgment entered for the petitioner.

Respectfully submitted,

CLINTON M. HORN,
Counsel for Petitioner.

FRED J. PERKINS,
Of Counsel.

APPENDIX.

OFFENSES AGAINST MINORS.

Ohio General Code

Sec. 12993: Regulating the Employment of Minors in Factories, etc.

Sec. 12993-1: Employment of Child During School Hours Unlawful, When.

Sec. 12994: Repealed.

Sec. 12995: Damage on Failure to Return Certificate on Termination of Employment.

Sec. 12996: Employment of Minors, Male and Female; Hours Per Day and Days Per Week.

Sec. 12996-1: Hours of Employment of Messenger Under Eighteen Years.

Sec. 12997: Time for Meals.

Sec. 12998: Two Lists of Minors Employed Shall Be Kept and One Conspicuously Posted.

Sec. 12999: Hindering or Obstructing Attendance at Part Time School or Class Unlawful.

Sec. 13000: Certificate as Prima Facie Evidence.

Sec. 13001: Prohibiting the Employment of a Child Under Sixteen Years in Certain Occupations.

Sec. 13002: "Prohibiting a Child Under Sixteen Years Working in Certain Capacities.—No child under the age of sixteen years shall be employed, permitted or suffered to work in any capacity (1) in, about or in connection with any processes in which dangerous or poisonous acids are used; (2) nor in the manufacture or packing of paints, colors, white or red lead; (3) nor in soldering; (4) nor in occupations causing dust in injurious quantities; (5) nor in the manufacture or use of dangerous or poisonous dyes; (6) nor in the manufacture or preparation of compositions with dangerous or poisonous gases; (7) nor in the manufacture or use of compositions

of lye in which the quantity thereof is injurious to health; (8) nor on scaffolding; (9) nor in heavy work in the building trades; (10) nor in any tunnel or excavation; (11) nor in, about or in connection with any mine, coal breaker, coke oven, or quarry; (12) nor in assorting, manufacturing or packing tobacco; **(13) nor in operating any automobile, motor car or truck**; (14) nor in a bowling alley; (15) nor in a pool room or billiard room; (16) **nor in any other occupation dangerous to the life and limb, or injurious to the health or morals of such child.**"

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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 179.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioner,

vs.

JOHN F. GUENTHER,
Respondent.

BRIEF OF RESPONDENT.

JAMES G. BACHMAN,
Counsel for Respondent.

EUGENE QUIGLEY,
WILLIAM M. BYRNES,
Of Counsel.

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INDEX.

Facts 1

The Questions Involved 2

Argument:

I. Did Section 13002 of the General Code of Ohio fix an age limit for the operator of respondent's automobile? 2

II. Did the ordinance fix an age limit?..... 3

III. Is a municipal ordinance a law within the meaning of the term fixed by law as used in the insurance policy issued to Guenther?..... 6

1. Petitioner's claim that "the commonly accepted meaning of the word 'law' includes municipal ordinances" is erroneous..... 6

2. The construction adopted by the Courts below does not deprive the insurance policy of all meaning and effect 8

3. The decisions of the Supreme Court and the Circuit Court of Appeals do not hold that ordinances are laws within the meaning of an insurance policy 9

4. How should the phrase "Fixed by Law" be construed? 15

Conclusion 21

Authorities Cited.

Baldwin vs. Philadelphia, 99 Pa. 164..... 20

Bearden vs. Madison, 73 Ga. 184..... 20

Brock vs. Travelers Insurance Co., 88 Conn. 308.... 4

Cumberland Tel. & Tel. Co. vs. City of Memphis, 198 Fed. 955 12

Davis vs. Homestead Boro, 47 Pa. Superior Ct. 444. 20

Devine vs. State, etc., 105 O. S. 288..... 6

Ferry vs. National Motor Underwriters, 244 Ill. App. 241 16

Fullwood vs. City of Canton, 116 O. S. 732..... 18

Haywood vs. Savannah, 12 Ga. 410..... 20

Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 452 7

Iron Mountain R. Co. vs. Memphis, 96 Fed. 113..... 9

Mabra vs. Atlanta, 78 Ga. 679..... 20

Mannheimer Bros. vs. Kansas Casualty & Surety Co., 147 Minn. 350 3

McCormick vs. Fayette County, 150 Pa. 190..... 20

Mutual Life Ins. Co., In the Matter of, 89 N. Y. 530. 12

New Orleans Water Works vs. Louisiana Sugar Co., 125 U. S. 18, 30..... 10

Rosenberg vs. City of Selma, 168 Ala. 195..... 19

Royal Indemnity Co. vs. Schwartz, 172 S. W. 581.. 14

Schambs, W. L. vs. Fidelity & Casualty Co., 259 Fed. 55 16

Stipcich vs. Metropolitan Life Ins. Co., 277 U. S. 311 (72 Law Edition 895)..... 17

Taylor vs. Philadelphia, 261 Pa. 458..... 20

Travelers Insurance Co. vs. Dunlap, 160 Ill. 642-647 16

Webster vs. Dwelling Ins. Co., 53 O. S. 558.....8, 16

Williams vs. Augusta, 4 Ga. 513..... 20

Williams vs. Bruffy, 96 U. S. 176..... 11

Wright vs. Mayor, etc. of Macon, 5 Ga. Appeals 750 20

Zeman vs. North American Union, 263 Ill. 304..... 17

American and English Encyclopedia of Law, Vol. 21 20
Blackstone's Commentaries, Vol. 1, page 44..... 6
Central Digest, Vol. 29, page 834..... 20
General Code of Ohio, Sections 6290 to 6310-37, 12603 to 12628-1 7
General Code of Ohio, Section 13002 .....1, 2, 7, 21
General Code of Ohio, Section 3714..... 15
R. C. L. Vol. 14, page 1926, par. 103..... 15
R. C. L. Vol. 6, page 854..... 16

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No. 179.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioner,

vs.

JOHN F. GUENTHER,
Respondent.

BRIEF OF RESPONDENT.

FACTS.

The facts in this case are not in dispute. At the time the automobile of Guenther was involved in an accident the following provision of the General Code of Ohio was in full force and effect:

> "Section 13002. No child under the age of 16 years shall be employed, permitted or suffered to work in any capacity * * * 13, nor in operating any automobile, motor car or truck; * * *."

There was also in effect the following Lakewood municipal ordinance:

> "It shall be unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of 18 years to operate or run said motor vehicle upon the public highways, streets or alleys in said City of Lakewood."

The clause of the insurance policy, the interpretation of which by the Courts below is here questioned, is as follows:

EXCLUSIONS

Paragraph A

THIS POLICY SHALL NOT COVER ANY LIABILITY OF THE ASSURED

3. While (any of the insured automobiles is) being operated by any person under the age limit fixed by law or under the age of 16 years in any event.

The respondent's employe was over 16 and under 18 years of age.

QUESTIONS INVOLVED.

I. Did section 13002, General Code of Ohio, fix an age limit for the operator of respondent's automobile?

II. Did the ordinance fix an age limit?

III. Is a municipal ordinance a "law" within the meaning of the term "fixed by law" as used in the insurance policy issued to Guenther?

Counsel for petitioner has ignored entirely the first two questions and has devoted his entire brief to the third.

ARGUMENT.

I.

DID SECTION 13002 OF THE GENERAL CODE OF OHIO FIX AN AGE LIMIT FOR THE OPERATOR OR RESPONDENT'S AUTOMOBILE?

The case was disposed of in the District Court and in the Court of Appeals on the theory that there was no general law regulating the age of the operators of automobiles, although the state legislature did in fact provide in Section 13002 the following—

"No child under the age of 16 years shall be employed, permitted or suffered to work in any capacity * * * 13 nor in operating any automobile, motor car or truck; * * *."

Thus the state legislature has in fact fixed 16 as the minimum age at which one may employ a person to operate an automobile and since it conceded that the operator of Guenther's automobile was over 16, at the time of the Kroger accident, the insured automobile was not being operated by any person under the age limit fixed by law. Therefore the insurance company was in error in denying liability and the judgments of the Courts below were correct because the state law as to age was not being violated.

II.

DID THE ORDINANCE FIX AN AGE LIMIT?

The clause of the insurance policy above quoted has to do with the age limit of *automobile drivers* as fixed by law. A most casual reading of the Lakewood ordinance discloses that it *does not prescribe an age limit for the operator of an automobile.* In other words, it is *not a violation of the ordinance* for a minor under the age of 18 years to operate a motor vehicle on the public highways of Lakewood. This being true, how can it be said that Theodore Winter, Guenther's driver, was operating the automobile in violation of the municipal ordinance?

We feel, therefore, that counsel's entire argument is all beside the point, because the car was *not* being operated *"by any person under the age limit fixed by law,"* nor was it being operated by any person under the age limit fixed by a *municipal ordinance.*

In the case of *Mannheimer Brothers vs. Kansas Casualty and Surety Company,* 147 Minn. 350, a clause in an insurance policy similar to the clause in the case at bar was

under consideration by the court. The clause read as follows:

> "This policy does not cover in respect of any automobile while driven or manipulated by any person contrary to the statutory age limit of any state or under the age of 16 years where there is no age limit."

The surety company refused to defend its assured because of the alleged violation of a statutory provision as to the age of the driver. Section 2621 of the G. L. 1913 declared no person under the age of 16 shall drive a motor vehicle unless accompained by the owner or a duly licensed chauffeur. Section 2638 directs that a license shall not be issued to any person under 18.

Sampson was over 16 but under 18, and was therefore not entitled to receive a license, though a license was in fact issued to him. The surety company contended that the insured's automobile was being driven by a person under the minimum fixed by statute for licensed chauffeurs, to-wit: 18 years. The court in construing the policy held that the statute provided merely that no license should be issued to one under 18 but that it did not expressly prohibit one under 18 from driving as a hired chauffeur—it prohibited one under 18 from driving as a chauffeur without a license; that the omissions as well as the contents of the statute are significant and must be construed in arriving at a correct construction.

It will be observed that this case had to do with a state statute and not with a city ordinance and yet the logic employed by the court is very applicable to the case at bar. The policy prohibits one under the age limit fixed by law from driving the automobile but the ordinance does not fix a minimum age for drivers, and the omissions as well as the contents of the ordinance are significant.

Charles W. Brock vs. Travelers Insurance Company, 88 Conn. 308,

"A policy issued to the owner of an automobile to indemnify him against loss for bodily injuries accidentally inflicted upon another, provided that the insurer should not be liable while the automobile was being driven by any person 'under the age fixed by law,' or under the age of 16 in any event. Held: that this clause had reference solely to the minimum age (not less than 16) at which one might lawfully drive a motor vehicle and that inasmuch as paragraph 5 of Chapter 85 of the Public Acts of 1911 expressly permitted a person 16 years or more, although not licensed, to drive a motor vehicle in this state if accompanied by a licensed operator, 16 must be regarded as the minimum age fixed by law and therefore the insurance company would not escape liability under this proviso for a loss sustained by the insured while his car was driven by an unlicensed person over 16 merely because of the non-observance upon the occasion in question of the statutory requirement that a licensed operator should accompany the unlicensed driver, a requirement which had no relevancy whatever to the age of the driver."

Plaintiff's son between 16 and 17 years of age was not licensed to operate an automobile and was not accompanied by a licensed operator. The company refused to indemnify upon the ground that at the time of the accident the automobile was being driven by a person under the age "fixed by law." The Court said

> "*Our statute does not in direct terms fix the age at which it shall be unlawful for a person to operate a motor vehicle* on the public highways."

The Act provides that no person under 18 may obtain a license and none but a licensed operator may operate a car. The Court said that if the operator were accompanied by a licensed chauffeur no claim could have been made that the operator was under the age fixed by law.

III.

IS A MUNICIPAL ORDINANCE A LAW WITHIN THE MEANING OF THE TERM "FIXED BY LAW" AS USED IN THE INSURANCE POLICY ISSUED TO GUENTHER?

1. Petitioner's Claim That "The Commonly Accepted Meaning of the Word 'Law' Includes Municipal Ordinances" is Erroneous.

The definition of law as quoted from Blackstone on page 10 of petitioner's brief is not in our opinion Blackstone's complete definition, and we therefore desire to call the Court's attention to the definition of "law" quoted by the Supreme Court of Ohio in the case of *Devine vs State, ex rel. Tucker, Jr.*, 105 O. S., 288, wherein the court said on page 290:

> "It is refreshing to return to some of the old landmarks of the law. Nothing has led to more confusion in the consideration and determination of the law than lack of clear and correct definition of the thing to be considered and determined. That master of legal definition in the English law, Sir William Blackstone, more than a century and a half ago, laid down this definition of law:
>
> "'A rule of civil conduct prescribed by the *supreme power in a state,* commanding what is right and prohibiting what is wrong. (1 *Blackstone's Commentaries,* 44.)'
>
> "Our American courts with substantial unanimity have approved that definition, with this addition, that such command and prohibition shall not be in clear conflict with our organic law, our written constitutions."

It thus follows that the ordinarily accepted meaning of the word "law" is that it is a rule of civil conduct prescribed by the supreme power in the state. The supreme power in a state is the state legislature, composed of a senate and a house of representatives, and any rule of civil conduct passed by a state legislature is always designated as a law, and never as an ordinance.

Counsel claims that automobile traffic within municipalities in Ohio is largely regulated and controlled by ordinances. In this he is mistaken, for a reference to the General Code of Ohio discloses that the supreme power in the State of Ohio, to wit: the legislature, has enacted a great many laws regulating almost every phase of the ownership, sale, use and operation of automobiles. These sections are 13002, 6290 to 6310-37 and 12603 to 12628-1 of the General Code, a total of seventy-six sections, and since the legislature of the state has enacted laws regulating the operation of automobiles, and fixing the minimum age of an employed operator, it is reasonable to suppose that these were the *laws* the insurance company had in mind in preparing its contract. As stated by the trial court in his opinion, if the insurance company really intended the violation of a municipal ordinance to forfeit the policy, it could have easily said so in language which would admit of no doubt of such intention. As a matter of fact insurance companies desiring to forfeit a policy for the violation of a municipal ordinance, so provide in their policies.

Counsel cites the case of *Imperial Fire Insurance Company vs. Coos County,* 151 U. S. 452. That case holds among other things the following:

> "2. When an insurance contract is fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the insured."

The suit was on a fire insurance policy and under its terms the County was prohibited from occupying the premises so as to increase the risk or from employing mechanics to alter or repair the same without written permission. The county employed mechanics and made extensive alterations without written permission as provided by the policy and, after a fire occurred, the insurance company refused to pay on the theory that the premises had

been altered and mechanics employed in that work. In this case there could be no reasonable doubt as to the meaning of the terms involved.

2. The Construction Adopted by the Courts Below Does Not Deprive the Insurance Policy of All Meaning and Effect.

Counsel claims that if the construction placed upon the word "law" by the Courts below is to be approved, an important clause of the policy would be deprived of meaning and effect. (Page 11 of his brief) This we deny. On the contrary were the Court to adopt the construction contended for by Counsel for petitioner the entire contract would be destroyed. His argument is that, since the state legislature saw fit not to enact a minimum age law for all drivers of automobiles, the court should enact a rule that in effect would nullify and forfeit the insurance granted by the contract, even though the skilled counsel for the insurance company who prepared the contract intentionally so phrased his contract that the word "ordinance" was not included, and therefore intentionally left the meaning of the policy, to say the least, in doubt. The construction contended for by petitioner violates all the usual rules of construction of insurance policies.

These rules are found in the opinion of Judge Spear in the case of *Webster vs. Insurance Company*, 53 O. S. 558:

> "A primal rule is that forfeitures are not favored either in equity or at law; indeed, it is declared as a universal rule that courts of equity will not lend their aid to enforce a forfeiture. Following as a corollary from this, provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. It is also a familiar rule of law, that if it be left in doubt, in view of the general tenor of the instrument and the relation of the contracting parties, whether given words were

used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee."

It is true that every part of an insurance contract should be considered in arriving at an interpretation thereof, and that no part of a policy should be rejected as insensible or inoperative if a rational and intelligent meaning can be given to it, and we respectfully submit that in the case at bar a rational and intelligent meaning can be given to the word "law" as used in this policy by giving to that word the meaning that people ordinarily ascribe to it, namely, a law passed by the state legislature, and by giving this meaning to the word the court will be construing the policy so as to enforce and not to forfeit it.

3. The Decisions of the Supreme Court and of the Circuit Court of Appeals do Not Hold That Ordinances Are Laws Within the Meaning of an Insurance Policy.

Counsel criticises the Courts below because of a distinction drawn between laws of a state and ordinances of a municipality, and in support of that criticism cites on page 12 of his brief *Iron Mountain R. Company vs. Memphis,* 96 Fed. 113. This case involved the construction of the 14th Constitutional Amendment prohibiting any state from depriving any person of property without due process of law and held that the City of Memphis could not, by passing a resolution, forfeit rights. We quote from the syllabus as follows:

> 1. The exercise by a city of its general power given it by the Legislature of controlling the streets and of making and enforcing contracts with reference to their occupancy by individuals or corporations, is action by the state *within the meaning of the provision of the first section of the 14th Constitutional Amendment* which prohibits any state from depriving any

person of property without due process of law and the passage of a resolution by the council of a city assuming to declare a forfeiture of a contract previously made with a railroad company under which the company occupies a street with its tracks and a declaration by the city of its intention to dispossess the company and take possession of the street by the use of its police is a threatened violation of a constitutional right of the company which a Federal Court has jurisdiction to restrain by injunction.

* * * * *

3. A resolution of a city council passed with all the form required for the passage of an ordinance asserting that there has been a breach by a railroad company of a contract by which the city granted to it an easement and franchise in a street and declaring a forfeiture of the rights granted and a resumption of possession of the street by the city, although conditioned upon a failure of the company to comply with certain requirements within a specified time, which time has elapsed, and the condition has not been complied with is a law of the state *within the meaning of Section 10 of Article I of the Constitution against the impairment* by a state of the obligation to contract.

This case simply decides that the Council of City of Memphis could not by the mere passing of an ordinance or resolution deprive a private individual of his property but was obligated to file its action in Court and follow the orderly procedure provided by law.

The next case cited by counsel for the plaintiff is that of *New Orleans Water Works vs. Louisiana Sugar Company,* 125 U. S. 18, 30. This Court simply construed the 14th Amendment and held that the ordinance in question was not in violation of that Amendment. The facts briefly are as follows:

The Water Works Company was chartered to supply water to the City of New Orleans from the Mississippi

River and it was given the exclusive privilege of supplying water to the inhabitants of the city and of using the public highways to construct its conduits, etc., and apparently there was nothing to prohibit those along the river from obtaining their own water supply if they cared to do so. The sugar company in this case was given permission, by ordinance, to lay water and sewage pipes from its factory to the river. An injunction was sought by the water company on the theory that the city in granting the sugar company permission to construct these conduits was violating the terms of its exclusive franchise. A writ of error to the United States Supreme Court was allowed on the theory that the ordinance in question was in violation of the Constitution of the United States. The writ was dismissed for want of jurisdiction.

On page 30 of the opinion the Court said that the prohibition is aimed at the legislative power of the State and then a quotation is made from an opinion of Mr. Justice Miller as follows:

> "It must be the Constitution or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the State, in the matter in which the conflict is supposed to exist, or the case for this court does not arise."

The Justice then cites the opinion of Mr. Justice Field in *Williams vs. Bruffy*, 96 U. S. 176, as follows:

> "Any enactment, from whatever source originating to which a State gives the **force of law**, is a statute of the state within the meaning of the clause cited * * *."

and then the Court goes on to say that portion of the opinion cited by counsel in his brief on page 13.

"So a by-law or ordinance of a municipal corporation *may be such* an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state having all the *force of law* within the limits of a municipality, that *it may* properly be *considered as a law within the meaning of this article of the Constitution of the United States.*"

In the case of *Cumberland Telephone and Telegraph Company vs. City of Memphis,* 198 Federal 955, the Court simply held that a municipal council could not pass an ordinance impairing the obligation of contract.

How does it avail counsel to argue to this Court in support of his contention that the Supreme Court of the United States will not sustain a municipal ordinance which impairs the obligation of contract or takes property without due process of law? Does the fact that the Supreme Court construes liberally the Federal Constitution to prevent forfeitures and assumes jurisdiction in such cases in order to examine into such claimed forfeitures support the strained contention that an ordinance is a law within the meaning of an insurance policy? Will this Court supply in the insurance policy that which learned counsel for the insurance company intentionally omitted?

It is the contention of counsel (on page 14 of his brief) that the word "law" as contained in the insurance policy includes municipal ordinances and that the violation of the city ordinance, not by the person who is operating the car but by the owner who employed a minor over 16 but under 18 to drive his car, forfeits the insurance.

In support of that contention he cites the case *In the Matter of the Mutual Life Insurance Company of New York,* 89 N. Y. 530. When the facts in this case are considered it will be apparent that the case is not an authority for the proposition contended for. The facts are as follows:

Under the provision of the Act of 1871 authorizing the Commissioner of Public Works of the City of New York

"to fix and establish the grades of streets" within a specified territory "where the same have not heretofore been fixed and established by law" not only were such grades excepted as had been fixed by legislative enactment but also those lawfully established by ordinance of the common council.

The assessment assailed in this proceeding was levied to pay the expense of grading 106th Street from Third Avenue to East River. The substantial error asserted is that the work was done without lawful authority and could not serve as the basis of a valid assessment. It was admitted that the Commissioner had a right to do the work upon the established grade, but he did more, he *changed* the grade and the question raised was—Did he have authority to do so? The authority claimed was derived from the Act of 1871 which empowered the Commissioner to fix and establish the grades of streets where they have not heretofore been fixed and established by law. It was admitted that the grade of 106th Street had been fixed and established by ordinance of the common council, but it was claimed that the Act of 1871 must be construed to except from the authority of the Commissioner only such grades as had been fixed by the act of the legislature and not such as had been established by ordinance. The court did not assent to this construction and said that *change* of grades was not authorized by the Act. The Act deals only with streets whose grades have not been established and where some authority must intervene to fix them for the first time. The Commissioner could fix grades where none had been lawfully determined. Where the grade had been lawfully established he was without power to make a change and since the grade had been established by the ordinance he was without authority to change the grade. In other words the grade having been established by a competent authority the Commissioner could not change the grade.

It is one thing to say this and another to say that an ordinance is a law within the meaning of an insurance policy.

Counsel cites to the Court the case of *Royal Indemnity Company vs. (Stewart) Schwartz,* 172 S. W. 581. This action was instituted by Schwartz against the Royal Indemnity Company to recover for expenses and attorney's fees in defending an action instituted against him, based on the alleged negligent act of his minor son who was under 18 years of age and who, while driving his father's car, killed a seven year old child. Schwartz notified the company of the accident and suit and when the company refused to defend, employed counsel at his own expense. A compromise was effected on the basis of $1,000.00 and then Schwartz instituted this action to recover from the insurance company expenses that he had incurred without, however, asking to be reimbursed for the $1,000.00. The insurance company refused to defend the suit against Schwartz on the theory that the automobile in question was being operated in violation of the city ordinance of El Paso. This ordinance provided that "it shall be unlawful for any person under the age of 18 years to drive an automobile within the city limits." The policy contained a provision that the company would not be liable for accidents if the automobile at the time of the accident was being driven by a person in violation of law as to age. The ordinance was held by the Court to be invalid and for that reason the judgment of the Court below awarding Schwartz $505.00, the amount of his expenses, was affirmed.

It will be observed that this ordinance prohibited one under 18 from driving. The ordinance in the case at bar does not and the decision was based on the fact that the ordinance in question was invalid. Therefore the quotation contained in plaintiff's brief on page 8 is merely *obiter dictum,* and in our judgment no authority whatever for counsel's proposition.

4. How Should the Phrase "Fixed by Law" Be Construed?

It is apparent from the cases cited by plaintiff and referred to in this brief and the cases cited by ourselves that the word "law" does not have a definite meaning, but is susceptible of at least two meanings. In a broad sense the word "law" includes all rules and regulations, irrespective of the source from which they originate, while in a strict sense law is a rule of civil conduct passed by a state legislature. In the United States and England the well recognized principles regulating civil conduct are designated the unwritten or "common law", and the written or "statute law". The meaning of the term "law" when taken in a broad sense is very different from that in a restricted sense. The word has two distinct meanings —it admits of duplicity of meaning and therefore it is ambiguous and it is our contention that because of this ambiguity of the word as used in the insurance policy that meaning must be adopted that will effect the purpose of the insurance policy, namely indemnity for the insured, rather than the meaning which might cause a forfeiture.

Section 3714 of the General Code, cited on page 14 of counsel's brief, specifically holds that municipal corporations shall regulate the use of streets in the manner **provided by law.** This phrase certainly does not refer to municipal ordinances but does refer to the laws enacted by the legislature, and the word "law" does not mean municipal ordinances but state statutes.

In the rule of construction laid down in 14 *R. C. L.* 1926, paragraph 103, we find that "such (insurance contracts) are to be most strongly construed against the insurer and in favor of the assured, especially where a forfeiture is involved, so that indemnity will be granted rather than denied."

Judge Denison in the case of *Wallace L. Schambs vs. Fidelity & Casualty Company,* 259 Fed. 55, laid down the rule that ambiguities in insurance policies are solved against the interests of the insurer, and further said in the opinion that:

> "This policy was drawn by the insurer; the company was presumably familiar with the common use and with the adjudged effect of this 'no action' clause; and it omitted that clause from this policy. It chose rather to rely upon language which lacks that certainty and freedom from ambiguity which might have been had, and the language which it selected must be construed according to the usual rules for ascertaining its true intent."

Where the words of a contract admit of an enlarged and a restricted meaning, a construction most beneficial to the promisee should be adopted. See 6 *R. C. L.* 854, and the cases there cited, particularly the case of *Webster vs. Dwelling Insurance Company,* 53 O. S. 558:

> "If it be left in doubt, in view of the terms of the instrument and the relation of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction will be adopted which is most beneficial to the promisee."

> "Where a policy of insurance is so framed as to make possible different interpretations of the same clause, that interpretation will be adopted in a suit upon the policy which is most favorable to the beneficiary."

Ferry vs. National Motor Underwriters, 244 Ill. App. 241.

> "A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent and of quite a different one in the hands of the adjuster."

Travelers Insurance Company vs. Dunlap, 160 Ill. 642-647.

"Contracts of insurance are construed strictly against the insurance company and liberally in favor of the assured and where two interpretations equally reasonable are possible, that interpretation should be adopted which will enable the beneficiary to recover."

Zeman vs. North American Union, 263 Ill. 304.

"If provisions in an insurance policy are with equal reason open to two constructions, that most favorable to the assured will be adopted."

Stipcich vs. Metropolitan Life Insurance Company, 277 U. S. 311. (72 Law Edition 895.)

See also cases cited by Mr. Justice Stone in the opinion of the court, page 322 (900).

Judge Westenhaver's opinion (Record page 21) of the rule we think is very well supported by authority. He says:

"If the language of a covenant or condition exempting the insurer from liability is susceptible of two constructions or meanings, that will be adopted which is most favorable to the insured. The expression 'by law' is at least susceptible of two constructions. It may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a State. Ordinarily, when one speaks of the 'law,' this is what is meant. One thus speaking, has in mind a rule of conduct of uniform and general application prescribed by the supreme law-making body of some sovereignty."

As lawyers we speak of state laws and municipal ordinances, thereby drawing in our own minds a distinction between a *law* passed by a state legislature and an *ordinance* passed by a municipal council. When we say a person has violated the law we mean that he has vio-

lated the state law and when he is charged with violating a municipal ordinance we do not say he has violated the law—we say he has violated the ordinance. This is the ordinary distinction that we carry in mind and people who are not lawyers have in mind the same distinction.

We are strengthened in our opinion that **an ordinance** is not a **law** within the meaning of the policy by what the Supreme Court of Ohio has said in its journal entry in the case of *F. H. Fullwood vs. the City of Canton*, 116 O. S. 732. Fullwood had for a number of years been engaged as an electrician in the City of Canton; in November, 1925, the Council of the City of Canton passed an ordinance creating a board for the examination and licensing of master electricians, prohibiting the plying of the trade by any one not licensed, and fixing a penalty for the violation of any of its provisions. Fullwood challenged the constitutionality of the ordinance and the question was raised in the Supreme Court of Ohio as to whether or not the **ordinance** was a **law** within the meaning of the following clause of the state constitution appearing in section two, article four—

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void."

It will be observed that the same word "**law**" is used in the Ohio constitution as is used in the policy of insurance under investigation. The following appearing on page 733 we think very pertinent to the question at issue in the case at bar:

> "Four members of this Court, Marshall, *C. J.*, Kinkade, Jones and Matthias, *JJ.*, hold that an **ordinance** of a municipality **is not a law** within the meaning of section two, article four (of the constitution), but Jones and Matthias, *JJ.*, holding this par-

ticular ordinance to be constitutional cannot consistently join in a judgment of reversal."

It will thus be seen that if our question—"Is an ordinance a law within the meaning of this insurance policy?" were presented to the Supreme Court of Ohio its answer would be "No." It therefore follows that even though the ordinance had in fact fixed the age limit of a driver at eighteen, still the violation of that ordinance would not justify the insurance company in its refusal to carry out the terms of its policy issued to Guenther, defend his lawsuit at its own expense and pay the judgment up to the amount indicated in the policy.

In the case of *Rosenberg vs. the City of Selma*, 168 Ala. 195, the plaintiff was convicted of violating an ordinance of the City of Selma with reference to the sale of liquor, the affidavit apparently charging him with doing the act "contrary to law." He appealed and the Court in its opinion said that the interpretation of the term "law" unless otherwise qualified is in penal proceedings presumed to refer to the common law, provided of course, statute has not given to the term another meaning. By statute "contrary to law" has been appropriated to the definition in indictments of violation of *statutes* touching the sale, etc., of prohibited liquor.

> "So far as we are advised the phrase has not been *thought apt or fit* in the allegation of a violation of any municipal ordinance. The mere fact that the City of Selma appears to be the complainant against appellant cannot, we think, avail to give the expression 'contrary to law' a meaning and effect equivalent to the express averment that in doing the act described the appellant violated the ordinance of the City of Selma. With that in this case he must have been clearly charged. Without that unequivocal allegation the complaint was defective."

In the case of *Taylor vs. Philadelphia,* 261 Pa. 458, it was held that an ordinance is not a law within the meaning of the constitutional provision prohibiting local or special legislation and the Court on page 465 of the opinion says:

> "The reason upon which the Act of 1917 is unconstitutional cannot apply because *ordinances are not laws* within the meaning of the constitutional provision prohibiting local or special legislation."

and in support of that proposition cites *Baldwin vs. Philadelphia,* 99 Pa. 164; *Davis vs. Homestead Boro,* 47 Pa. Superior Ct. 444; *McCormick vs. Fayette County,* 150 Pa. 190.

Wright vs. Mayor and Council of Macon, 5 Ga. Appeals 750 was an action brought to reverse the conviction of the violation of a "locker" ordinance. In the course of the opinion and on page 763 the Court said:

> "The contention that municipal ordinances are necessarily included or intended by the use of the word 'law' in the proviso to the Tax Act cannot be sustained. Ordinances are mere rules or by-laws of a municipal corporation. In *Bearden vs. Madison,* 73 Ga. 184, it was held that the ordinances referred to had the *force* of law and yet they are distinguished from the law of the land, but it cannot be presumed that the legislature in using the word 'law' in the proviso to subdivision 47 of section 2 of the Tax Act had in mind the by-laws of municipalities any more than it was considering the laws of nature, for the Court does not take judicial cognizance of municipal ordinances" * * * "that the word 'law' does not ordinarily include municipal ordinances, see 21 *American and English Encyclopedia of Law;* 29 *Central Digest* 834, paragraph 122; *Williams vs. Augusta,* 4 Ga. 513; *Mabra vs. Atlanta,* 78 Ga. 679; *Haywood vs. Savannah,* 12 Ga. 410."

It is apparent therefore that the word "law" has both a broad and a restricted meaning and in our case that meaning should be adopted which will grant indemnity rather than forfeit the insurance. To adopt the construction contended for by petitioner, the Court would have to disregard Section 13002 of the General Code and construe the clause under consideration as though it were written

> This policy shall not cover any liability of the assured while the insured automobile is being operated by any person under the age limit fixed by law; or when it is being operated by any person under 18 years of age, in the event that it shall be made unlawful by a municipal ordinance to permit such vehicle to be operated by one under the age of 18; or under the age of 16 in any event.

When the question is thus presented, it is perfectly apparent that the Courts below could not so construe this clause and hence there was nothing to do except to enforce the contract and this was done. The judgment of the Court of Appeals in affirming that of the District Court was absolutely correct, and therefore there is no question in this record calling for any decision by this Court.

CONCLUSION.

1. Neither Guenther nor his employe at the time of the Kroger accident was operating the automobile in violation of Section 13002 of the General Code. The automobile therefore at the time of the accident was not being operated by any person under the age limit fixed by law.

2. The operator of Guenther's automobile was not violating the Lakewood ordinance as to age.

3. A municipal ordinance is not a law within the meaning of the term "fixed by law" as used in the policy.

4. The policy contains no provision exempting the company from liability where the insured automobile is being operated in violation of any provision of the municipal ordinance as to age.

5. The phrase "under the age limit fixed by law" can be fully satisfied by reference solely to the laws of the state, thereby avoiding forfeiture and affecting the purpose of the insurance contract, namely—indemnity for the insured.

We feel therefore that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES G. BACHMAN,
Counsel for Respondent.

EUGENE QUIGLEY,
WILLIAM M. BYRNES,
Of Counsel.

FILE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 179.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

vs.

JOHN F. GUENTHER,
Respondent.

PETITION FOR REHEARING.

WILLIAM M. BYRNES,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 179.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
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vs.

JOHN F. GUENTHER,
Respondent.

PETITION FOR REHEARING.

Now comes the above named respondent, John F. Guenther, and presents this his petition for a rehearing of the above entitled cause and in support thereof respectfully presents the following:

This case presents for the Court's consideration and determination the proper construction to be placed on an ordinance enacted by the Council of the City of Lakewood, Ohio and also upon the phrase *"fixed by law"* contained in a policy of insurance issued by the petitioner to the respondent, the precise questions being whether or not that phrase in a strict construction of the policy of insurance should be construed to mean *fixed by municipal ordinance,"* and whether or not the ordinance fixes an age limit.

During the argument of this case counsel for the respondent was advised that the Court concurred in his statement of the law that insurance policies are liberally construed in favor of the assured and strictly against the insurance company and secondly that if the language in an insurance policy is susceptible of a *broad* and also of a

restricted meaning the Court will adopt *that meaning* of the language which will *grant the indemnity rather than deny it.*

The District Court and Court of Appeals both held that the term "fixed by law" as used in the policy of insurance was reasonably susceptible of the meaning "fixed by a law enacted by a state legislature," the sovereign law making body in the state and thus could be so construed as to carry out the purpose of the contract, namely the granting of indemnity to the assured.

It must be conceded that the common purpose that the insurance company and Guenther had at the time the policy was issued was to indemnify Guenther against personal injury claims, regardless as to where accidents might occur and it has been the universal practice of courts of last resort to construe insurance policies to give them force and effect, if possible. We respectfully submit that the judgments of the courts below in enforcing the policy and granting the indemnity therein provided were in strict accord with the great weight of judicial authority.

The Court will take judicial notice of the fact that the automobile, as a means of transportation, is universally used by the entire population of this great country and automobiles are now used to transport passengers and merchandise from the Atlantic to the Pacific and from the Great Lakes to the Gulf of Mexico. This Court will also take judicial notice of the fact that continental United States is made up of a great many independent states, each sovereign and supreme within its own limits and the insurance company at the time it issued its policy had in mind that the insured automobile might be driven from Cleveland to Portland, Maine or to Portland, Oregon, to San Diego, California or to Key West, Florida or to any other point within the United States. It also had in mind that the insured automobile would be driven by persons other than

the assured and by minors. It was desirous of limiting its liability when the automobile was operated by minors because it fixed its own minimum age and refused to accept any responsibility in the event that the car was operated by any one under the age of sixteen. It also fixed the minimum age of the operator as that "fixed by law." The policy was a practical contract and not a theoretical one. The duties and obligations imposed on the assured, of necessity, must be practical and it must be conceded that the insurance company did not intend to impose upon the assured any condition with which he could not comply or a duty impossible of performance, in order to have his insurance effective.

In Ohio alone we have 1338 townships, each with the right to fix a minimum age limit for automobile operators. Under this contract of insurance must the automobile owner know the minimum age limit fixed by municipal ordinance of every municipality through which his automobile may be driven under penalty of losing in time of need the indemnity for which he pays? Within the 48 states of the union there are at least 50,000 municipalities deriving their power and authority from the state within whose limits they are located. The insured automobile may be driven through any one of these 50,000 municipalities. As a practical proposition, we confidently assert that no automobile owner could ascertain the names of all the municipalities through which his car might pass, much less know the municipal requirements as to the age of drivers.

A trip of 250 to 300 miles in a single day is today the rule rather than the exception when automobiles are used for touring. Such a trip is an every day occurrence for commercial automobiles. Is it possible or practicable for any assured to know the municipal limits of each city, town and village through which his car would pass on a day's journey? Is it within the realm of practicability for him

to know or ascertain the regulations of each municipality as to the age of drivers? It is common knowledge that municipal councils do not have uniform ordinances with reference to the age limits of drivers. Some will have fixed the ordinance at sixteen, others perhaps at fourteen, some at eighteen, some at nineteen, twenty or twenty-one and many will fix no age limit whatever.

If the term "fixed by law" is to be construed as meaning "fixed by municipal ordinance," then we say that as a practical matter the assured will probably have to take his chances. He may be protected in one municipality and he may enter another where he is not protected and these municipalities may be adjoining and the dividing line nothing more than an imaginary line in the center of some street. The roadway on both sides of this dividing line will be exactly the same, traffic conditions will be exactly the same, the automobile will be the same, the driver will be the same, the driver's age however will comply with the terms of the policy on one side of this imaginary line but on the other side of the imaginary line it will not. The policy will be enforcible and the insurance company liable to pay the indemnity, if the accident occurred on one side of this imaginary line but if it occurred ten feet on the other side of the imaginary line there would be no liability on the part of the insurance company and no indemnity for the assured. Certainly this condition of affairs was not within the contemplation of the parties at the time the policy was issued and as said by the District Court, the soliciting agent would be unable to sell a policy if we were to tell his prospect that this interpretation would be placed upon it by the adjuster.

> "A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent and of quite a different one in the hands of the adjuster."
>
> *Travelers Insurance Company vs. Dunlap,* 160 Ill. 642-647.

As a practical proposition therefore in the course of a single day's journey from Cleveland to Cincinnati, a trip of 260 miles, under exactly the same circumstances as to road conditions, traffic conditions, ability and age of driver and automobile, the policy would be enforcible and unenforcible a hundred times or more.

If the decision of the Court in this case is to be the law of the land, then, to be on the safe side, whenever the assured entrusts his automobile to a minor he must know the municipal ordinance regulating age in every municipality within Ohio and there are 1338 townships in this state; he must know, while touring, the municipal regulations of every township in the country and there are at least 50,000 of them. On the other hand, representatives of the insurance company can sit idly by until they receive a report of an accident, then communicate with the city or village clerk of the place where the accident occurred, ascertain as to whether or not there is any municipal regulation as to the age or drivers; if there is none, and the driver was sixteen years of age or over, give the service provided for in the contract, whereas on the other hand if there is a regulation that has been violated, whether the limit be twenty-one or anything below that to sixteen, it can deny liability.

The odds, therefore, are 1338 to 1 in Ohio alone against the assured and in favor of the insurance company and in the United States the odds are 50,000 to 1 against the assured. Is this a liberal construction of the policy in favor of the assured? We respectfully submit therefore that this construction could not have been in the mind of the insurance company or the assured at the time the policy was issued.

If "fixed by law" means fixed by state law as decided by the Court of Appeals, the assured would have definite information as to the laws of the various states as to age of automobile drivers. He knows or could easily ascertain

that the state of Arkansas fixes the age limit at eighteen; the states of New Jersey and Indiana fix it at seventeen; nineteen states fix it at sixteen; nine states at fifteen; six states at fourteen; one state, South Carolina, at twelve and ten states fix no limit. Thus in forty-five out of forty-eight states he knows the legal age limit of automobile drivers is fixed at sixteen or under. In forty-seven states Guenther would have been indemnified under the circumstances of the case at bar. Did not the insurance company have in mind this almost universal legal age of sixteen or under as the age fixed by law rather than the age that might be fixed by any one of 50,000 municipalities? Is this not the more apparent when it fixes its own minimum at sixteen?

If this Court, therefore, should adopt the judgment of the Court of Appeals and limit the term "fixed by law" to that limit fixed by state legislatures there would be no condition impossible of performance placed upon the assured and both the assured and the insurance company would have equal opportunity of knowing whether or not the policy was enforcible at any given place.

If the assured intends to drive his automobile only in Ohio he can easily ascertain whether or not the state legislature has fixed a minimum driving age. If his journey takes him across the Ohio River into Kentucky he will know that no one between fourteen and sixteen is permitted to drive unless accompanied by an adult and that any one over sixteen may drive. He will know that in Tennessee there is no age limit as in Ohio; that in Georgia the minimum age limit is sixteen. In Florida the minimum age limit is fourteen unless the driver is accompanied by the owner or a licensed chauffeur. If his route takes him through West Virginia, North Carolina and South Carolina he will know that the minimum age in West Virginia is fourteen, in North Carolina sixteen and in South Carolina twelve. Thus a practical effect could be given to the phrase "fixed by law" and the policy could be in force all the time rather

than in force and ineffective times without number and at places unknown to the assured, and because of the practical importance of this proposition to every automobile owner in the United States, we respectfully urge the Court to reconsider this case.

We respectfully present for the further consideration of the Court the fact that in the Lakewood ordinance there was *no age limit fixed by it* for the operator of an automobile.

We also desire to refer the Court to the decisions cited in our brief on pages 18, 19 and 20, holding that a *municipal ordinance* is not a *law* under the circumstances of the cases cited.

The question presented by this record is not whether a municipal ordinance may impose a more onerous obligation upon drivers of automobiles than that imposed by state law, but rather "Can the policy be reasonably construed to effect its purpose, indemnity for the assured?"

Does not the fact that the two Federal Courts in this case reached a conclusion different from that reached by this Court indicate that there is some doubt, to say the least, as to the meaning of this phrase "fixed by law" and if there be some doubt should not that doubt be resolved in favor of the assured? Is not this especially true when the insurance company, by the use of the words "or municipal ordinance" after the word "law" in the phrase "fixed by law" could have eliminated all doubt had it intended to place on the phrase "fixed by law" the meaning "fixed by municipal ordinance"?

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Court of Appeals be upon further consideration affirmed.

WILLIAM M. BYRNES,

Counsel for Respondent.

CERTIFICATE OF COUNSEL.

I, William M. Byrnes, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM M. BYRNES,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 179.—October Term, 1929.

United States Fidelity & Guaranty Company, Petitioner, *vs.* John F. Guenther.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 24, 1930.]

Mr. Justice Sanford delivered the opinion of the Court.

In February, 1925, the Fidelity & Guaranty Co. issued to Guenther, a resident of Cleveland, Ohio, an automobile insurance policy, insuring him against loss and expense arising from claims upon him for damages in consequence of any accident occurring within the United States or Canada by reason of the use of his automobile and resulting in bodily injuries to another person. The policy provided that it was subject to the express condition that it "shall not cover any liability of the assured while (the automobile is) being operated by any person under the age limit fixed by law or under the age of sixteen years in any event."

In May, while the policy was in force, the automobile was being operated, with Guenther's consent and permission, by a minor seventeen years of age upon the highways and streets of the city of Lakewood, Ohio, and collided with and inflicted personal injuries upon a third person. At that time there was in force in the city of Lakewood an ordinance which made it "unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of 18 years to operate or run said motor vehicle upon public highways, streets or alleys in said City of Lakewood." No statute of the State of Ohio made unlawful the operation of an automobile by minors over sixteen years of age.

The injured person sued Guenther, and recovered judgment. Guenther, having paid this judgment, brought an action against the Company on the insurance policy to recover the loss and expense incurred by him in the personal injury suit. This was removed

to the Federal District Court for northern Ohio, where Guenther recovered judgment, which was affirmed by the Circuit Court of Appeals. 31 F. (2d) 919.

The sole question presented here is whether, under the terms of the policy, liability of the Company was excluded by reason of the municipal ordinance.

1. We think that within the plain meaning of the policy the operator of the automobile was "under the age limit fixed" by the ordinance. True it is that the ordinance does not fix a general age limit for operators of automobiles. But as the ordinance makes it unlawful for the owner of an automobile to permit a minor under eighteen years of age to operate it, to say that when the owner permits a minor only seventeen years of age to operate it the operator is not "under the age limit fixed" by the ordinance, would be merely sticking in the bark.

2. The fact that a State statute prohibits the employment of a child under sixteen years of age to operate an automobile[1] does not affect the validity of the city ordinance. Municipal corporations in Ohio are given "special power to regulate the use of the streets, to be exercised in the manner provided by law," and "the care, supervision and control of public highways, streets," etc.[2] Plainly, the general statute which merely forbids the employment of minors under sixteen years to operate automobiles, does not prevent the city, in the exercise of its delegated power to regulate the use of its streets, from prohibiting the operation of automobiles by minors under eighteen years of age. Such a regulation merely supplements locally the provision of the general statute and is not in conflict with it. Thus, in *Heidle* v. *Baldwin*, 118 O. S. 375, 385, the court held that a municipality had the power to adopt regulations as to the use of its streets in addition to those imposed by a state statute, and sustained an ordinance imposing a more onerous obligation upon drivers at intersecting streets than that imposed by the statute.

3. This brings us to the question whether the age limit fixed by the municipal ordinance is one "fixed by law" within the meaning of the policy.

In *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452, 462, this court said: "It is settled . . . that, when an insurance con-

[1] Throckmorton's Annotated Code of Ohio, § 13002.
[2] Throckmorton's Annotated Code of Ohio, § 3714.

tract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

Applying that rule here, we think that when the words of the exclusion clause are taken in their ordinary meaning they are free from any ambiguity that requires them to be construed most strongly against the Company. The plain and evident purpose of the clause was to prevent the Company from being held liable for any accident occurring while by reason of the age of the operator the automobile was being operated in violation of law. To that end liability was excluded when the operator was under "the age limit fixed by law." This is not limited to the case where the age limit is fixed by "a law," a specific phrase frequently limited in a technical sense to a statute, which, to say the least, would have involved doubt as to whether a municipal ordinance was included. On the contrary the clause uses the broad phrase "fixed by law," in which the term "law" is used in a generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force; including valid municipal ordinances as well as statutes. Thus in the *Matter of Petition of Mutual Life Insurance Co*, 89 N. Y. 530, 531, 533, the court held that a street grade fixed and established by an ordinance of the city council, duly authorized thereto, was one "fixed and established by law."

We find no ambiguity in the phrase "under the age limit fixed by law" contained in the exclusion clause of the policy; and think that by reason of the ordinance, liability on the part of the Company is precluded.

The judgment is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.